No. 17-587	
Title:	**Mount Lemmon Fire District, Petitioner** **v.** **John Guido, et al.**
Docketed:	October 19, 2017
Linked with 17A226	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(15-15030)
Decision Date:	June 19, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Aug 25 2017	Application (17A226) to extend the time to file a petition for a writ of certiorari from September 17, 2017 to October 18, 2017, submitted to Justice Kennedy.
Aug 30 2017	Application (17A226) granted by Justice Kennedy extending the time to file until October 18, 2017.
Oct 18 2017	Petition for a writ of certiorari filed. (Response due November 20, 2017)
Nov 08 2017	Order extending time to file response to petition to and including December 18, 2017.
Dec 18 2017	Brief of respondents John Guido, et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 02 2018	Reply of petitioner Mount Lemmon Fire District filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 03 2018	DISTRIBUTED for Conference of 1/19/2018.
Feb 05 2018	DISTRIBUTED for Conference of 2/16/2018.
Feb 20 2018	DISTRIBUTED for Conference of 2/23/2018.
Feb 26 2018	Petition GRANTED.

Mar 23 2018	Motion to dispense with printing the joint appendix filed by petitioner Mount Lemmon Fire District. **Main Document** **Proof of Service**
Mar 23 2018	Joint motion for an extension of time to file the briefs on the merits filed. **Main Document**
Mar 26 2018	Joint motion to extend the time to file the briefs on the merits is granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 7, 2018. The time to file respondents' brief on the merits is extended to and including July 5, 2018.
Apr 06 2018	Blanket Consent filed by Respondent, John Guido, et al. **Blanket Consent**
Apr 16 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
May 04 2018	Blanket Consent filed by Petitioner, Mount Lemmon Fire District. **Blanket Consent**
May 07 2018	Brief of petitioner Mount Lemmon Fire District filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
May 14 2018	Brief amici curiae of National Conference of State Legislatures, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 05 2018	Brief of respondents John Guido, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jul 09 2018	SET FOR ARGUMENT On Monday, October 1, 2018
Jul 12 2018	Brief amici curiae of AARP, AARP Foundation and NELA filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 12 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Jul 12 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Aug 03 2018	CIRCULATED

Aug 06 2018	Reply of petitioner Mount Lemmon Fire District filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 07 2018	Record requested from the U.S.C.A. 9th Circuit.
Aug 24 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 30 2018	Record from the U.S.C.A. 9th Circuit is electronic and located on PACER.
Oct 01 2018	Argued. For petitioner: E. Joshua Rosenkranz, New York, N. Y. For respondents: Jeffrey L. Fisher, Stanford, Cal.; and Jonathan C. Bond, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Nov 06 2018	Adjudged to be AFFIRMED. Ginsburg, J., delivered the opinion of the Court, in which all other Members joined, except Kavanaugh, J., who took no part in the consideration or decision of the case.
Dec 10 2018	JUDGMENT ISSUED.

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Age Discrimination in Employment Act (ADEA) defines certain private and public entities as "employers" and prohibits them from discriminating against employees because of their age. The Act applies to private entities only if they had "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b).

The question presented is:

Under the ADEA, does the same twenty-employee minimum that applies to private employers also apply to political subdivisions of a State, as the Sixth, Seventh, Eighth, and Tenth Circuits have held, or does the ADEA apply instead to all State political subdivisions of any size, as the Ninth Circuit held in this case?

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INTRODUCTION

For decades, the courts of appeals have read the Age Discrimination in Employment Act (ADEA) to cover both private businesses and State political subdivisions only if they have at least twenty employees. That uniform threshold for federal liability has permitted the States to calibrate age discrimination policies for small private and public employers alike. Perhaps most importantly, the States have judged how best to regulate their special districts—a class of small, modestly funded political subdivisions that provide vital services like fire protection to local communities.

In this case, the Ninth Circuit displaced those longstanding State judgments. Expressly splitting from every other circuit to consider the issue, the court read the ADEA to cover *all* political subdivisions, no matter how small—even though the statute exempts private businesses with fewer than twenty employees. As to small special districts, therefore, the court replaced the varying age discrimination policies of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington with a one-size-fits-all federal standard.

The Ninth Circuit's unprecedented construction of the ADEA has generated several inexplicable rifts in federal antidiscrimination law. For one, the ADEA's coverage is now far broader within the Ninth Circuit than outside it. That means the powers of California and Nevada have been curbed more significantly than those of Utah and Colorado, merely because of geographic happenstance. Further, within

the Ninth Circuit, the ADEA's coverage is now markedly uneven. The statute covers the smallest public employers but exempts similarly sized private entities—even when the two perform comparable functions. That disparity is particularly puzzling in light of Title VII, which prohibits other forms of workplace discrimination. Title VII indisputably covers both private entities and State political subdivisions only if they have at least fifteen employees. Under the Ninth Circuit's reading, the ADEA's coverage would be *less* extensive than Title VII's for private employers, but *more* extensive for public employers—an illogical inconsistency between otherwise parallel statutes.

These rifts in antidiscrimination law are not the work of Congress. Rather, they are the product of the Ninth Circuit's flawed brand of textualism—a methodology that construed fragments of the ADEA in isolation rather than reading the statute's words "in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016); *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). When the ADEA is interpreted holistically, as this Court requires, it must carry the narrower meaning endorsed by the other courts of appeals: State political subdivisions, like private entities, are subject to federal age discrimination liability only if they have twenty or more employees.

This case presents the Court with an opportunity to reaffirm fundamental canons of statutory interpretation and repair unprecedented ruptures in the framework of federal antidiscrimination law. The Court should grant certiorari and reverse the decision below.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 859 F.3d 1168 and reproduced at Pet. App. 1a-17a. The district court's unpublished decision is reproduced at Pet. App. 18a-37a.

JURISDICTION

The Court of Appeals entered judgment on June 19, 2017. Pet. App. 1a. On August 30, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including October 18, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definitions of "person" and "employer" under the ADEA, 29 U.S.C. §§ 630(a)-(b). Section 630 is reproduced in full at Pet. App. 38a-42a. The parallel section of Title VII, 42 U.S.C. § 2000e, is also reproduced in full at Pet. App. 43a-47a.

STATEMENT OF THE CASE

1. The ADEA generally prohibits covered employers from taking adverse employment-related actions because of an employee's age. *See* 29 U.S.C. § 623. As originally enacted in 1967, the statute applied only to private entities. That narrow scope stemmed from the specific definitions of two statutory terms: "person" and "employer." A person meant (and still means) "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, le-

gal representatives, or any organized groups of persons." Pub. L. No. 90-202, § 11(a), 81 Stat. 602, 605 (1967).

The original ADEA defined "employer," in turn, by narrowing the reach of the term "person":

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.

Id. § 11(b), 81 Stat. 605. This definition expressly excluded three groups of employers that the statute might otherwise have covered. The first group was defined by activity: entities that did not engage in "an industry affecting commerce." The second group was defined by size: entities with fewer than twenty-five employees. And the third group was defined by governmental affiliation: the federal government, federally owned corporations, the States, and smaller political subdivisions. Taken together, these exclusions meant that the ADEA applied only to certain private employers with at least twenty-five employees.

In 1974, however, Congress amended these sections of the ADEA with language that remains in force today. *See* Pub. L. No. 93-259, § 28(a)(1)-(2), 88 Stat. 55, 74 (1974), *codified at* 29 U.S.C. § 630(b). The amendment retained the original definition of "person." *See* 29 U.S.C. § 630(a). But it narrowed two of the exclusions contained within the definition of "employer":

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Id. § 630(b). The first exclusion, for entities that do not engage in "an industry affecting commerce," remains intact. But the second exclusion, based on size, now applies only to entities with fewer than twenty employees, rather than the original twenty-five. And the provision directly at issue in this case, the third

exclusion based on governmental affiliation, now applies only to the federal government and federally owned corporations.[1]

The 1974 amendment made clear that States and political subdivisions of States are no longer categorically excluded from the ADEA's coverage. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). But the amendment's syntax raised a question about the reach of local governmental liability under the statute: whether the twenty-employee minimum, which indisputably applies to private employers, also applies to State political subdivisions.

Prior to this litigation, every court of appeals to confront that question—the Sixth, Seventh, and Eighth Circuits—reached the same answer: The statutory text is ambiguous, but is best read to impose the same twenty-employee threshold on State political subdivisions that it imposes on private employers. *See Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *EEOC v. Monclova Twp.*, 920 F.2d 360, 362-63 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270-73 (7th Cir. 1986).

2. This case raises precisely this question about the ADEA's scope. In Arizona, as in many States, residents depend on State political subdivisions called special districts for a range of vital services. These districts are generally created by petition of, and often staffed by, local property owners or officials. *See*

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[1] Federal employers are covered by a separate section of the ADEA. *See* 29 U.S.C. § 633a.

Ariz.Rev.Stat. Ann. § 48-261. Their budgets are independent, drawn primarily from local property taxes. *Id.* And each district provides a particular service to the local community: fire prevention, electricity, irrigation, waste management, water conservation, pest control, or any of dozens of other functions authorized by statute. *See id.* §§ 48-301–48-6819. These entities, which are typically small in size, abound. According to the U.S. Census, as of 2012, there were 38,266 special districts[2] nationwide, performing a vast range of functions. U.S. Census Bureau, *Special District Governments by Function and State: 2012* (hereinafter "*Special District Governments*") (Sept. 26, 2013), http://tinyurl.com/y8bdha3h; U.S. Census Bureau, *Individual State Descriptions: 2012* (hereinafter "*State Descriptions*") at x (Sept. 2013), http://tinyurl.com/ybk3q2wh.

Petitioner Mount Lemmon Fire District ("Mount Lemmon") is one of Arizona's special fire districts. It is part of a patchwork of similar districts across the State, each authorized to provide fire protection in a particular community. Ariz.Rev.Stat. Ann. § 48-805(B)(1); *see* Tucson Fire Foundation, *Fire Departments and Fire Districts in Arizona* (Nov. 4, 2009), http://tinyurl.com/yah5b2v3. Many of these fire dis-

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[2] The U.S. Census defines "special district governments" as "[o]rganized local entities other than county, municipal, township or school district governments" that "are authorized by state law to provide only one or a limited number of designated functions, and with sufficient administrative and fiscal autonomy to qualify as separate governments." U.S. Census Bureau, *Lists & Structure of Governments*, http://tinyurl.com/y8zz8tbj.

tricts, including Mount Lemmon, have modest budgets. *See* Ariz.Rev.Stat. Ann. § 48-807; Arizona Fire District Association, *Fiscal Year 2017/2018 Fire District Required Budget Postings*, http://tinyurl.com/y7sybnva. Yet the services they provide are essential—particularly in Arizona, a State under constant threat of large wildland blazes.

Like many of its peer districts, Mount Lemmon is (by necessity) leanly staffed. In 2009, it had just eleven full-time employees. Mount Lemmon's Rule 56.1 Statement of Facts at ¶ 16, *Guido v. Mount Lemmon Fire. Dist.*, No. 13-cv-00216-TUC-JAS (D. Ariz. Aug. 8, 2014), ECF No. 69. So when a drop in property tax revenue created a budget shortfall, Mount Lemmon went to great lengths to avoid further cutbacks in personnel. It sought out additional revenue from every available source, ranging from bake sales to supplemental work in wildland territory on behalf of federal authorities. *Id.* ¶¶ 1-11. But those efforts fell short; in 2009, Mount Lemmon was forced to reduce annual expenses by tens of thousands of dollars. *Id.* ¶ 12. It did so by laying off the respondents, John Guido and Dennis Rankin, for six months. Both of them had been hired by Mount Lemmon in 2000, when Guido was in his late-thirties and Rankin his mid-forties. At the time of the layoffs, Guido was 46 years old and Rankin 54. *See* Pet. App. 19a-20a.

Respondents allege that they were impermissibly laid off because of their age. The Arizona Civil Rights Act, which applies to a wide swath of the State's political subdivisions, bars discrimination on the basis of age. Ariz.Rev.Stat. Ann. §§ 41-1461, 1463(B). But

the respondents commenced litigation instead under federal law, invoking the ADEA.

3. Respondents filed this federal age discrimination suit in 2013. After discovery, Mount Lemmon moved for summary judgment. It argued, in relevant part, that the ADEA applies to State political subdivisions only if they have at least twenty employees—a threshold that Mount Lemmon, with its full-time staff of eleven, did not meet. The district court agreed. Following the Sixth, Seventh, and Eighth Circuits, the court concluded that § 630(b)'s text is ambiguous, but is best read to impose the same twenty-employee minimum on State political subdivisions that it imposes with respect to private employers. Pet. App. 20a-26a. The district court then reviewed Mount Lemmon's employment records and held, as a matter of law, that the fire district had fewer than twenty employees in the relevant time period, thereby excluding it from the ADEA's coverage. Pet. App. 26a-37a. The district court thus granted Mount Lemmon's summary judgment motion.

Respondents appealed. Challenging a unanimous body of circuit precedent, they argued that § 630(b) unambiguously subjects State political subdivisions of any size to the ADEA's coverage. Respondents also argued that Mount Lemmon was liable under the prevailing reading of the statute because it had at least twenty employees during the relevant time period. While the appeal was pending, a fourth court of appeals—the Tenth Circuit—joined the Sixth, Seventh, and Eighth Circuits in unanimously construing § 630(b) as ambiguous but best read to cover State political subdivisions only if they have twenty or more

employees. *See Cink v. Grant Cty.*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015).

The Ninth Circuit reversed the district court's ruling for Mount Lemmon. It recognized that "four other circuits have considered this issue and all have declared § 630(b) to be ambiguous." Pet. App. 11a. But the court expressly split from its sister circuits in favor of a novel construction of the statute. Concluding that "§ 630(b) is not ambiguous," the Ninth Circuit held that it applies to all State political subdivisions, no matter how small, "[a]s a matter of plain meaning." Pet. App. 13a-14a. In the court's view, the contrary reading endorsed by unanimous panels of the Sixth, Seventh, Eighth, and Tenth Circuits was too "underwhelming" to be "deemed reasonable." Pet. App. 12a-13a.

The Ninth Circuit then deepened the circuit split even further. As an alternative ground for its decision, the court held that even if the ADEA were ambiguous, "[t]he best reading of the statute would be that the twenty-employee minimum does not apply to a political subdivision of a State." Pet. App. 14a. In reaching that holding, the Ninth Circuit squarely rejected the evidence of statutory purpose on which the Sixth, Seventh, Eighth, and Tenth Circuits relied in reading the statute more narrowly. Pet. App. 14a-17a.

Having so construed the ADEA, the Ninth Circuit declined to review the district court's conclusion that Mount Lemmon had fewer than twenty employees during the relevant time period. Pet. App. 17a. The court's interpretation of § 630(b)'s scope was thus the sole ground for its decision.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Has Irreconcilably Divided The Courts Of Appeals.

The division of authority on the question presented is clear and undisputed. Five federal circuits—including two very recently—have addressed the extent to which political subdivisions of a State qualify as employers under the ADEA. These courts have reached diametrically opposed conclusions on two distinct issues: whether the meaning of "employer" under § 630(b) is ambiguous, and—if it is—whether the term is best read to encompass State political subdivisions only if they have twenty or more employees. The Court should grant this petition to resolve that acknowledged and intractable division of circuit court authority.

A. The Sixth, Seventh, Eighth, and Tenth Circuits construe § 630(b) as ambiguous and best read to cover State political subdivisions only if they have twenty or more employees.

The Sixth, Seventh, Eighth, and Tenth Circuits hold that the reference to State political subdivisions in § 630(b)'s second sentence can reasonably be read in two different ways. First, it could be construed "merely ... to make it clear that states and their political subdivisions are to be *included*" in the preceding "definition of 'employer,'" on the same terms as private entities. *Kelly*, 801 F.2d at 270-71; *see Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362-63. Under that construction, § 630(b)'s second sentence does not

separately define all political subdivisions as a distinct category of employers. Rather, it clarifies that political subdivisions are no longer categorically excluded from coverage, as they had been under the original ADEA. *Cf.* Pub. L. No. 90-202, § 11(b), 81 Stat. 605.

Alternatively, these circuits have suggested, § 630(b) could perhaps be read to define *all* political subdivisions as employers by "setting" them "in a separate sentence" that does not expressly reiterate the twenty-employee minimum. *Kelly*, 801 F.2d at 270; *see Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362-63. So construed, § 630(b)'s second sentence would do more than eliminate the prior exclusion of all State political subdivisions from the ADEA's reach; it would also affirmatively subject those subdivisions to far more expansive federal age discrimination coverage than their private-employer counterparts.

To decide which of those competing interpretations should prevail, the Sixth, Seventh, Eighth, and Tenth Circuits examined the ADEA's current and prior text, its purposes and legislative history, and its relationship to other federal anti-discrimination statutes. *Kelly*, 801 F.2d at 270-73; *Palmer*, 154 F.3d at 896-97; *Monclova*, 920 F.2d at 362-63. The courts uniformly concluded that those considerations dispositively favor the narrower construction: The ADEA applies to State political subdivisions, like private employers, only if they have at least twenty employees.

More specifically, these circuits first pointed to substantial evidence that the 1974 ADEA amendment

was designed to create parity in § 630(b)'s coverage of private and governmental employees. For example, when Senator Bentsen—the amendment's sponsor—first proposed revisions to § 630(b)'s definition of "employer" in 1972, he referred to the "principle[]" that "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy." 118 Cong. Rec. 15894-95 (May 4, 1972); *see Monclova*, 920 F.2d at 363; *Kelly*, 801 F.2d at 271. The next year, a special Senate committee examined ways to improve the ADEA and concluded: "[I]t is difficult to see why one set of rules should apply to private industry and varying standards to government." Special S. Committee on Aging, 93d Cong., Improving the Age Discrimination Law 17 (Comm. Print 1973); *see Kelly*, 801 F.2d at 271-72. And in urging the president to sign the 1974 amendment into law, Senator Bentsen reiterated that "passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector." 120 Cong. Rec. 8768 (Mar. 28, 1974); *see Monclova*, 920 F.2d at 363; *Kelly*, 801 F.2d at 272. Notably, no congressional report "drew any distinction between the coverage of public and private employers." *Kelly*, 801 F.2d at 272.

The Sixth, Seventh, Eighth, and Tenth Circuits next noted that Congress's 1974 ADEA amendment was intended to mirror the effect of its 1972 amendment to Title VII. As this Court has recognized, "[t]here are important similarities between the two statutes, ... both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." *Lorillard v. Pons*, 434 U.S.

575, 584 (1978). Initially, both the ADEA and Title VII applied only to private employers with at least twenty-five employees. Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (1964); Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605 (1967). In 1972, however, Congress amended § 701 of Title VII to extend coverage to the States and smaller State political subdivisions—subject to the revised fifteen-employee minimum that also applies to private employers. Pub. L. No. 92-261, § 701(b), 86 Stat. 103 (1972); *see Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). In amending the ADEA's substantive prohibitions, Senator Bentsen expressly invoked that same parity for public and private employees, explaining that "the principles underlying [the 1972 Title VII amendment] are directly applicable to the Age Discrimination in Employment Act." 118 Cong. Rec. 15895; *see Kelly*, 801 F.2d at 271.

Moreover, and relatedly, applying the ADEA to State political subdivisions regardless of size "would lead to some anomalous results" within the broader framework of federal antidiscrimination law. *Kelly*, 801 F.2d at 273. In the private sector, Title VII's coverage is indisputably broader than the ADEA's—it reaches businesses with at least fifteen employees, where the ADEA requires twenty employees. In the Seventh Circuit's view, that distinction reflects that Congress "viewed the problems addressed by Title VII ... to be more serious than the problem of age discrimination." *Id.* (citing *Wyoming*, 460 U.S. at 231). If the ADEA applied to State political subdivisions of any size, however, that statutory hierarchy would be inverted in the public sector. The ADEA would have "much broader coverage ... than Title VII," which also

applies its fifteen-employee minimum to States and their political subdivisions. *Id.* The Seventh Circuit rejected that result as incoherent, noting that the ADEA's legislative history provides "no support whatsoever" for altering the relationship between the two statutes depending on the nature of the employer. *Id.*

In light of these considerations, the Sixth, Seventh, Eighth, and Tenth Circuits all concluded—in unanimous panel decisions—that the ADEA applies only to those State political subdivisions that have twenty or more employees.[3]

B. In stark contrast, the Ninth Circuit construes § 630(b) as unambiguously covering (or, alternatively, best read to cover) all State political subdivisions, no matter how small.

The Ninth Circuit recognized that twelve appellate judges had unanimously "declared § 630(b) to be ambiguous" regarding its coverage of State political subdivisions. Pet. App. 11a. But the court explicitly rejected that longstanding consensus. Consciously departing from its four sister circuits, the Ninth Circuit held that § 630(b) unambiguously applies to all State political subdivisions, no matter how small. Pet. App.

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[3] A district court within the Fourth Circuit has reached the same conclusion. *Smith v. Wythe-Grayson Reg'l Library Bd.*, 657 F. Supp. 1216, 1219 (W.D. Va. 1987).

14a.[4] The court then further deepened the split by holding, in the alternative, that even if the statute were ambiguous, it would be best read to cover State political subdivisions of any size. *Id.*

The Ninth Circuit reasoned that § 630(b) must be read to create "three distinct categories" of employers that are liable under the ADEA. Pet. App. 7a. The first is a certain type of "person," defined in § 630(b)'s first sentence. Pet. App. 6a. The second is an "agent of [a] person," defined in the first clause of § 630(b)'s second sentence. *Id.* And the third consists of "State-affiliated entities," defined in the second clause of § 630(b)'s second sentence. *Id.* In the Ninth Circuit's view, those categorical distinctions are mandated by the word "also" at the beginning of § 630(b)'s second sentence. Pet. App. 7a-8a.

The Ninth Circuit then characterized the statute's twenty-employee threshold as "clarifying language" for the first category of employers (persons). Pet. App. 6a-7a. And it concluded, as a matter of "ordinary meaning," that such clarifying language could not also apply to the third category of employers (States and smaller political subdivisions). Pet. App. 7a-8a. The court justified this conclusion primarily through analogies to a pair of hypothetical texts—one defining the term "password," the other defining "bank." *Id.*; *see infra* at 27-28.

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[4] A district court within the Eleventh Circuit has also concluded that the ADEA covers all political subdivisions, regardless of size. *Holloway v. Water Works & Sewer Bd. of Town of Vernon*, 24 F. Supp. 3d 1112, 1117 (N.D. Ala. 2014).

Beyond those two hypotheticals, the Ninth Circuit sought to bolster its novel construction of § 630(b) by noting that Congress had failed to unambiguously *apply* the twenty-employee threshold to State political subdivisions. The court suggested that Congress could have "added the limiting language" requiring at least twenty employees "to each definition discussed in § 630(b), or at least to the definition covering political subdivisions, but it chose not to." Pet. App. 10a. Alternatively, the court contended, Congress could have amended the definition of "person" to explicitly list "political subdivisions." Pet. App. 10a, 15a. In the court's view, Congress's failure to legislate in those particular terms confirmed that § 630(b) could *only* be read *not* to apply the twenty-employee minimum to State political subdivisions. *Id.*

The Ninth Circuit then deepened its split from the Sixth, Seventh, Eighth, and Tenth Circuits by reaching its alternative holding: that even if § 630(b) *were* ambiguous, "[t]he best reading of the statute would be that the twenty-employee minimum does not apply to a political subdivision." Pet. App. 14a. In doing so, the court considered, but dismissed, the evidence of statutory purpose on which its sister circuits relied in reading the statute more narrowly. In particular, the Ninth Circuit acknowledged that the Senate's 1973 special committee report "discuss[ed] how the same set of rules should apply to the private sector and the government," and that "a House report" and "statements by Senator Bentsen" contained similar language. Pet. App. 15a-16a. But the court concluded that those sources failed to "address the specific question before us" because they referred to "rules" generally, rather than stating specifically "that the twenty-

employee minimum should apply to political subdivisions" on the same basis that it applies to private employers. *Id.*

The Ninth Circuit relied instead on a comparison between the ADEA and Title VII. As noted, Title VII originally applied only to private employers with at least twenty-five employees. Pub. L. No. 88-352, § 701(b), 78 Stat. 253. In 1972, Congress amended Title VII to cover private employers, States, and political subdivisions with at least fifteen employees. Pub. L. No. 92-261, §§ 2(1)-(2), 86 Stat. 103; *see* 42 U.S.C. § 2000e. The text of that amendment differed in certain respects from the subsequent 1974 amendment to the ADEA—just as the two statutes differed in their original, pre-amendment language. *See infra* at 34-36. On that basis, the Ninth Circuit concluded that Congress must have intended the ADEA to apply more broadly than Title VII, as it otherwise would certainly "have used the same language" in both statutes. Pet. App. 15a.

The Ninth Circuit's split from its sister circuits is thus clear and comprehensive. The court expressly considered, but squarely rejected, the grounds on which the Sixth, Seventh, Eighth, and Tenth Circuits declared that § 630(b) is ambiguous. And in reaching its alternative holding, the Ninth Circuit also considered and rejected the indicia of statutory purpose that led the Sixth, Seventh, Eighth, and Tenth Circuits to decide that § 630(b)—if ambiguous—is best read to apply the statutory twenty-employee threshold to State political subdivisions. The two sides of the split have weighed all the same arguments. They simply read § 630(b) in irreconcilably different ways.

II. The Question Presented Is Important And Recurring.

Before the Ninth Circuit's decision in this case, the ADEA had consistently been read to cover State political subdivisions only if they had twenty or more employees. That uniform federal threshold allowed the States to calibrate age discrimination policies for their unique networks of small political subdivisions, including special districts. Most States—Arizona among them—have opted to prohibit age-based employment decisions by some of the small governmental entities beneath the ADEA's twenty-employee floor. But the precise thresholds for liability vary. *Compare, e.g.*, Ariz.Rev.Stat. Ann §§ 41-1461, 41-1463 (prohibiting age discrimination by political subdivisions only if they have at least fifteen employees) *with* Ore.Rev.Stat. Ann. §§ 659A.001, 659A.030 (prohibiting age discrimination by all political subdivisions).

The Ninth Circuit's decision splits what should be one uniform federal framework into two competing regimes. In Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, the ADEA now covers all State political subdivisions, even very small ones. That means a one-size-fits-all federal standard has displaced State judgments about how best to regulate small political subdivisions, including special districts—like Mount Lemmon—that provide critical services to local communities. In the remainder of the country, the ADEA, like Title VII, covers only larger State political subdivisions.

Resolving this rift in the applicability of federal age discrimination law is a matter of vital importance. As long as the division of authority stands, the relationship between the federal government and the States will vary dramatically based on geographical happenstance. Congress will, in effect, have curbed the powers of California and Nevada much more significantly than those of Utah and Colorado. And that discrepancy affects a fundamental aspect of State sovereignty: the regulation of political subdivisions authorized by state statute to provide fire prevention, electricity, waste management, and dozens of other services to residents. Only this Court can correct that arbitrary tilt in the federal balance.

Until the Court intervenes, the question presented is sure to recur. Special districts—just one kind of State political subdivision—exist in great numbers. As noted, in 2012, there were 38,266 of them nationwide, performing a vast range of functions. *Special District Governments*, *supra*; *State Descriptions*, *supra*, at x. Many of these districts have fewer than twenty employees.[5] And as of 2012, nearly a fifth of them—7,247—were located within the Ninth Circuit. *See State Descriptions*, *supra*, at 9, 11, 24, 74-76, 176, 186, 234, 291.

In short, a substantial number of small districts (unlike their private-employer counterparts) now face

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[5] For example, by our count, Illinois publicly reported 1671 special districts with full-time or part-time employees in 2016, and over 60% of them had fewer than twenty such employees. *See* Illinois Comptroller, *Financial Databases*, http://tinyurl.com/yb36wnoc.

the prospect of ADEA lawsuits fueled by the Ninth Circuit's decision in this case. Such litigation is sure to proliferate, and will necessarily raise the question presented here. It will also impose new financial burdens on the local governmental units least equipped to afford them, threatening the continued availability of the essential services they provide. *See Kelly*, 801 F.2d at 272 n.3 (noting that Illinois park districts "are independent of other larger governmental entities and thus operate on limited budgets"). The need for the Court's review of this circuit split is thus particularly pressing.

III. The Ninth Circuit Erred In Holding That § 630(b) Covers State Political Subdivisions Of Any Size.

The Ninth Circuit split from the unanimous consensus of four sister circuits only by employing a flawed brand of textualism that defies this Court's precedents. "Statutory language cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Rather, it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.*; *see Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Ninth Circuit did just the opposite here. It construed fragments of § 630(b) in isolation and "in the abstract," *Sturgeon*, 136 S. Ct. at 1070, ignoring other portions of the statute that cut squarely against the court's unprecedented interpretation.

When § 630's text and structure are construed holistically, as this Court requires, the Ninth Circuit's broad reading proves indefensible. That conclusion is confirmed by the purposes and history of the ADEA, both standing alone and in relation to Title VII.

A. The text and structure of § 630 establish that State political subdivisions are "employers" only if they have twenty or more employees.

Two features of § 630 demonstrate that the statute is best read to cover only those State political subdivisions with twenty or more employees, as the Sixth, Seventh, Eighth, and Tenth Circuits have held. The Ninth Circuit failed to account for either feature.

1. First, the opening clause of § 630(b)'s second sentence provides that the term "employer" under the ADEA "also means (1) any agent of such a person." The Ninth Circuit noted in passing that under its novel construction of the statute, this "agent" clause—like the subsequent reference to political subdivisions within the same sentence—must be read to create a "distinct categor[y]" of employers liable under the ADEA. Pet. App. 7a. But the court never considered whether that reading of the "agent" clause was viable, let alone unambiguously correct. It thus failed to confront a critical flaw in its interpretation of § 630(b): Construing "agents" as a distinct category of employers would vastly expand the ADEA's scope in a way that every court of appeals to consider the question—including the Ninth Circuit itself—has expressly rejected.

Under the ADEA, any "employer" who violates the statute's prohibitions "shall be liable to the employee or employees affected" for backpay and damages, along with equitable relief. 29 U.S.C. § 216(b) (incorporated into the ADEA by § 626(b)). If § 630(b)'s "agent" clause defined a distinct category of employers, therefore, agents of a qualifying "person" would be independently liable for age discrimination. That would include, for example, supervisory personnel who act as agents for their organizations in making and carrying out employment decisions. Several employees have indeed sued their supervisors under precisely that theory. And some of them initially prevailed after district courts concluded—as the Ninth Circuit did here—that the "agent" clause was most naturally read to create a distinct category of employers who can be subject to ADEA liability in their own right. *See House v. Cannon Mills Co.*, 713 F. Supp. 159, 161-62 (M.D.N.C. 1988) (concluding that the ADEA's "express language" imposed "personal liability on all 'employers,'" including qualifying agents); *Elias v. Sitomer*, No. 91 CIV. 8010 (MBM), 1992 WL 370419, at *5 (S.D.N.Y. Dec. 7, 1992) (similar).

Ultimately, however, every court of appeals to consider the issue, including the Ninth Circuit itself, has read the "agent" clause more narrowly: as an "unremarkable expression of respondeat superior" liability for "persons" who qualify as employers under § 630(b)'s first sentence. *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994); *see Sabouri v. Ohio Dep't of Educ.*, 142 F.3d 436, at *2 (6th Cir. 1998) (unpublished); *Martin v. Chem. Bank*, 129 F.3d 114, at *3 (2d Cir.

1997) (unpublished); *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 n.8 (7th Cir. 1997); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994).[6] These decisions do not dispute that the "agent" clause, in isolation, could naturally be read to describe a distinct category of "employers" liable under the ADEA. But they conclude that such a reading would be "incongruous" in light of the broader statutory scheme, which seeks to exempt small entities from the "burden" of federal liability. *Birkbeck*, 30 F.3d at 510.

The courts of appeals thus agree that the ADEA's "agent" clause describes a particular mechanism for holding qualifying "persons" liable—and not a distinct category of liable employers. In other words, the opening clause of § 630(b)'s second sentence merely clarifies the scope of the statute's first sentence. The Ninth Circuit implicitly rejected that longstanding consensus in this case. It concluded that § 630(b)'s second sentence—including the "agent" clause—could not be read to "clarify the previous definition" of "employer." Pet. App. 7a. But the court never explained why that was the best reading of the "agent" clause, let alone the only reasonable one. It did not purport to find fault with prior circuit case law (including its own decision in *Miller, supra*) that reads the "agent" clause

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[6] The courts of appeals have also uniformly concluded that Title VII's analogous "agent" clause, 42 U.S.C. § 2000e(b), "does not cover a supervisor in his personal capacity." *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 972 (D.C. Cir. 2001) (collecting cases).

more narrowly to avoid "incongruous" results. *Birkbeck*, 30 F.3d at 510. Instead, the Ninth Circuit simply ignored the implications of its statutory construction for the "agent" clause. In doing so, it failed to read the words of the statute "in their context and with a view to their place in the overall statutory scheme," as this Court requires. *Sturgeon*, 136 S. Ct. at 1070; *Roberts*, 566 U.S. at 101. And it overlooked a critical aspect of § 630(b)'s text that cuts directly against the court's novel construction of the statute.

2. The Ninth Circuit was equally inattentive to a second feature of § 630(b): The court did not meaningfully consider whether the term "person" in the statute's first sentence encompasses political subdivisions of a State. Yet that issue—like the meaning of the "agent" clause—bears on the question presented. If "person" includes political subdivisions, then § 630(b)'s first sentence defines all political subdivisions with at least twenty employees as employers. It would then be strangely redundant for § 630(b)'s second sentence to separately define *all* political subdivisions as employers—the Ninth Circuit's construction here. But it would be entirely consistent for § 630(b)'s second sentence merely to *clarify* that political subdivisions, unlike certain other governmental entities, are no longer categorically exempt from statutory coverage—the construction endorsed by the Sixth, Seventh, Eighth, and Tenth Circuits. *Cink*, 635 F. App'x at 474 n.5; *Palmer*, 154 F.3d at 896-97; *Monclova*, 920 F.2d at 362; *Kelly*, 801 F.2d at 270-71. That reading would also be consistent with the "agent" clause, which the courts of appeals uniformly understand to clarify the scope of § 630(b)'s first sentence.

The Ninth Circuit summarily dismissed this reading of "person." It concluded in a footnote, without explanation or citation, that "political subdivisions are not defined as persons in § 630(a)." Pet. App. 7a n.3. Again, however, the court failed to explain why that was the only viable reading of the statute. This Court has repeatedly construed the term "person" in federal statutes to include local governments. *See Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003) (False Claims Act); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (42 U.S.C. § 1983). And a more probing examination of § 630(a) shows that, contrary to the Ninth Circuit's assumption, "person" should likewise be read to encompass State political subdivisions under the ADEA.

Section 630(a) defines a "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. § 630(a). The catch-all phrase "any organized groups of persons" is particularly sweeping—and circular, using the very term ("person") that it seeks to define. This language is most naturally read to include special districts like Mount Lemmon, which are often organized and staffed by local property owners. And it certainly does not *exclude* such entities with any clarity. At a minimum, the breadth and circularity of the language create an ambiguity as to whether the statute's definition of "person" encompasses State political subdivisions.

Any such ambiguity, in turn, must be resolved in favor of including political subdivisions in the definition of "person." The ADEA's original text is particularly instructive. When the statute was first enacted, § 630(a) contained the current definition of "person." Pub. L. No. 90-202, § 11(a), 81 Stat. 605. As noted, § 630(b) then defined "employer" by narrowing the term "person" in several ways. *Id.* § 11(b). Most importantly, it expressly *excluded* "the United States, a corporation wholly owned by the Government of the United States, or a State *or political subdivision thereof*." *Id.* (emphasis added). The exclusion of political subdivisions would have been mere surplusage if the term "person" already omitted local governments—a result this Court rejects where feasible. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). But the exclusion of political subdivisions would make perfect sense if "person," standing alone, includes those entities. The statute must be so construed. *Cf. Hutchins v. U.S. Dep't of Labor*, 683 F.3d 75, 77 (4th Cir. 2012) (provision of 5 U.S.C. § 8132 stating that "the liable party must be a 'person' besides the United States" established that "political entities," including local governments, "can be 'persons'").

3. The Ninth Circuit's failure to interpret § 630(b) holistically, as this Court requires, is perhaps most apparent in its flawed analogies to hypothetical texts. As noted, the court likened the ADEA to two invented provisions. First, it "imagine[d] someone saying: 'The password can be an even number. The password can also be an odd number greater than one hundred.'" Pet. App. 7a-8a. The court reasoned that in such a text, the phrase "greater than one hundred"—which

clearly applies to the phrase "odd number"—could not also apply to the phrase "even number." Pet. App. 8a.

Second, the Ninth Circuit invented a statute that read: "The word bank means 'the rising ground bordering a lake, river, or sea' and the word also means 'a place where something is held available....'" *Id.* The court then explained that the phrase "bordering a lake, river, or sea"—which clearly applies to the phrase "rising ground"—could not also apply to the phrase "a place where something is held available." *Id.* In the court's view, it was particularly "obvious" that such a construction would be improper because the resulting alternate definition of bank—"a place where something is held available" "bordering a lake, river, or sea"—would be "illogical." *Id.*

Both of those invented provisions, like § 630(b), contain two sentences. But the similarities end there. Neither hypothetical includes language comparable to the "agent" clause. And neither uses a pair of definitional phrases—like "person" and "political subdivisions"—that are best read as overlapping rather than mutually exclusive. The invented provisions thus omit the very textual and structural features of § 630(b) that call into question the Ninth Circuit's broad construction. Moreover, the "bank" statute becomes "illogical" when read narrowly. Section 630(b), in contrast, remains entirely coherent when read to subject private businesses and State political subdivisions to the same twenty-employee threshold for ADEA liability. By relying on these inapposite analogies, the Ninth Circuit doubled down on its failure to read the ADEA's words "in their context and with a

view to their place in the overall statutory scheme." *Sturgeon*, 136 S. Ct. at 1070.

At bottom, the only common ground among § 630(b) and the Ninth Circuit's invented provisions is that in each case, the word "also" appears near the beginning of the second sentence. The court may have considered that word alone to be dispositive. Quoting Webster's New Collegiate Dictionary, it noted that "also" generally means "in addition; besides" and "likewise; too." Pet. App. 7a. On that basis, the court concluded that § 630(b)'s second sentence must "add[] another definition to a previous definition of a term," rather than "clarify[ing] the previous definition." *Id.*

But the dictionary definition of a single word linking statutory phrases does not possess such talismanic significance. Rather, all statutory language—including connecting terms like "also"—must be construed within the context of the broader statutory scheme. This Court took precisely that approach in *McNally v. United States*, 483 U.S. 350 (1987). There, a prior version of 18 U.S.C. § 1341 proscribed conduct using two distinct phrases linked by the word "or": "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (emphasis added). The issue before the Court paralleled the question presented here: whether "the money-or-property requirement of the latter phrase" also applies to the "scheme or artifice to defraud" mentioned in the first phrase. *McNally*, 483 U.S. at 357-58.

The dictionary defines "or" as a disjunctive term generally used to "indicate an alternative." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/or. And this Court recognized that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property." *McNally*, 482 U.S. at 358. After considering how the language at issue fit into the broader statutory scheme, however, the Court reached a different conclusion: The money-or-property requirement applied to both phrases, and the second phrase merely *clarified* the first by making it "unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359.

Section 630(b) should be construed in the same holistic fashion. And, as in *McNally*, a dictionary definition of "also" cannot nullify compelling textual and structural evidence that the reference to "political subdivisions" in § 630(b)'s second sentence merely clarifies the scope of the preceding definition of "employer."

4. When § 630(b) is read holistically, therefore, the narrower interpretation endorsed by the Sixth, Seventh, Eighth, and Tenth Circuits is not only reasonable—it is the best reading of the statute. And that conclusion becomes even clearer after considering § 630(b)'s implications for the balance between federal and State powers. This Court has long held that

"'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting *Gregory*, 501 U.S. at 460). Accordingly, before construing a provision to "affect[] the federal balance," a court must identify a particularly "clear statement" to that effect in the statute's text. *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). This "background principle" of statutory interpretation ensures "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* (quoting *Bass*, 404 U.S. at 349).

The Ninth Circuit's flawed construction of § 630(b) would have a substantial effect on the federal balance. Despite their limited personnel and budgets, the country's smallest political subdivisions—including fire districts like Mount Lemmon—provide critical services to a wide swath of local communities. For decades, States have determined how best to regulate the employment practices of these subdivisions in light of their staffing constraints and the vital functions they perform. The Ninth Circuit's broad reading of the ADEA would improperly displace those State judgments without the required clear statement from Congress.[7]

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[7] The Ninth Circuit actually *inverted* the clear statement rule. It emphasized that "Congress could have" unmistakably exempted small State political subdivisions by expressly adding the twenty-employee minimum "to each definition discussed in

B. The purposes and history of the ADEA, both standing alone and in relation to Title VII, confirm that State political subdivisions are "employers" only if they have twenty or more employees.

1. The majority construction of § 630(b) is further buttressed by analysis of the ADEA's purposes and history. To begin with, substantial evidence indicates that the amended statute was designed to subject private, local governmental, and State employers to the same prohibitions. *See* 120 Cong. Rec. 8768 (Mar. 28, 1974) (statement of Sen. Bentsen) ("passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector"); Special S. Committee on Aging, 93d Cong., Improving the Age Discrimination Law 17 (Comm. Print 1973) ("[I]t is difficult to see why one set of rules should apply to private industry and varying standards to government."); 118 Cong. Rec. 15894-95 (May 4, 1972) (statement of Sen. Bentsen) ("employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy").

By contrast, no congressional report "drew any distinction between the coverage of public and private employers." *Kelly*, 801 F.2d at 272. That would be a

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§ 630(b), or at least to the definition covering political subdivisions, but it chose not to." Pet. App. 10a. The court mistakenly concluded that Congress's failure to *exclude* small political subdivisions in such clear terms confirmed that § 630(b) could *only* be read more expansively. *Id; see supra* at 17.

puzzling omission if Congress intended radically broader coverage of governmental entities. Moreover, the Ninth Circuit itself has recognized that the ADEA "limits liability to employers with twenty or more employees ... in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims." *Miller*, 991 F.2d at 587. That rationale applies with full force to modestly funded special districts like Mount Lemmon.

Relatedly, the ADEA was designed to mirror Title VII. As this Court has emphasized, the two statutes, although not identical, have "important similarities" and work in tandem to prohibit workplace discrimination. *Lorillard*, 434 U.S. at 584. As originally enacted in 1964, Title VII covered private entities with at least twenty-five employees; three years later, the ADEA was signed into law with an identical scope. Title VII was then amended in 1972 to cover private, local governmental, and State employers that meet a uniform fifteen-employee minimum. Two years later, Congress sought to expand the ADEA's scope in the same way. *See* 118 Cong. Rec. 15895 (statement of Sen. Bentsen) ("the principles underlying [the 1972 Title VII amendment] are directly applicable to the Age Discrimination in Employment Act"). The narrower reading of § 630(b) comports with that statutory purpose, providing that the ADEA—like Title VII—subjects private and public employers to a uniform employee minimum. The statutes thus remain symmetrical and complementary "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." *Lorillard*, 434 U.S. at 584.

The Ninth Circuit's aberrant construction, in contrast, would create an incoherent federal antidiscrimination regime. When it comes to private employers, Title VII would sweep more broadly than the ADEA, suggesting that "the problems addressed by Title VII"—including discrimination based on race, sex, and national origin—are "more serious than the problem of age discrimination." *Kelly*, 801 F.2d at 271 (citing *Wyoming*, 460 U.S. at 231). For State political subdivisions, however, just the opposite would be true: The ADEA would sweep far more broadly than Title VII, suggesting an inversion of antidiscrimination priorities. As the Seventh Circuit noted, there is "no support whatsoever" for such an inexplicable disparity in the broader framework of federal law. *Id.* at 273.

2. The Ninth Circuit erroneously disregarded that evidence of the ADEA's purposes and history. Pet. App. 15a-16a. Instead, it held that certain textual differences between the ADEA and Title VII show that Congress intended to establish the uneven federal antidiscrimination regime just described, in which the ADEA's scope is narrower than Title VII's in the private sector but far broader in the public sphere. Pet. App. 15a. Nothing in either statutory scheme supports that illogical outcome.

As originally enacted, both Title VII and the ADEA defined an "employer" as a certain type of "person." And both statutes expressly excluded political subdivisions from coverage. *See* Pub. L. No. 88-352, § 701(b), 78 Stat. 253; Pub. L. No. 90-202, § 11(b), 81 Stat. 605. But the statutes differed in several respects. Most significantly, Title VII defined "person"

in narrower terms—as "one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers." Pub. L. No. 88-352, § 701(b), 78 Stat. 253. The ADEA's more sweeping definition of "person," in contrast, extended to "any organized groups of persons"—a phrase far more expansive than any language in Title VII's definition. Pub. L. No. 90-202, § 11(a), 81 Stat. 605.

When Congress amended Title VII to cover certain public employers, it expressly added "governments, governmental agencies, [and] political subdivisions" to the statute's relatively narrow definition of "person." Pub. L. No. 92-261, § 2(1), 86 Stat. 103. The amendment also eliminated the separate clause that expressly excluded political subdivisions from coverage. *Id.* § 2(2). Those changes extended statutory coverage to political subdivisions with at least fifteen employees. *See* 42 U.S.C. § 2000e.

Two years later, Congress took a different approach when amending the ADEA's distinct statutory text. It left the broader definition of "person," including the circular phrase "any organized groups of persons," in place. *See* Pub. L. No. 93-259, § 28, 88 Stat. 74. And it eliminated the categorical prohibition of State political subdivisions from coverage. *Id.* As explained, those changes extended statutory coverage to political subdivisions with at least twenty employees, mirroring the effect of the recent amendment to Title VII.

The Ninth Circuit mistakenly concluded that those post-amendment differences between the two statutes mean that the ADEA's minimum employee threshold cannot extend to State political subdivisions. In the court's view, "[i]f Congress had wanted the 1974 ADEA Amendment to achieve the same result as the 1972 Title VII Amendment, it could have used the same language." Pet. App. 15a. But there is no such interpretive rule. When Congress amends statutes that are differently worded to begin with, it need not harmonize their language in order to achieve similar legislative ends. To hold otherwise would require an unprecedented and impracticable congressional effort to standardize language across the entire United States Code. Here, Congress may simply have decided that Title VII's relatively narrow definition of "person" required additional words to clarify the inclusion of political subdivisions, whereas the ADEA's broader definition needed no such clarification. The Ninth Circuit's effort to draw anything more conclusive from the inter-statute comparison is without basis. And, as noted, it consciously deviates from the analysis of all other courts of appeals that have addressed the question.

IV. This Case Is An Ideal Vehicle For Answering The Question Presented And Resolving The Circuit Split.

Finally, this case presents an ideal vehicle to decide the question presented. The Ninth Circuit received extensive submissions on the scope of the ADEA's coverage of State political subdivisions. The parties addressed the issue in two distinct rounds of

briefing, the second devoted entirely to the Tenth Circuit's intervening decision in *Cink*. *See* No. 15-15030, ECF Nos. 34-37. And the Equal Employment Opportunity Commission filed a brief as amicus curiae. *Id.* ECF No. 12. The question presented thus received comprehensive attention in the proceedings below.

Further, the Ninth Circuit's resolution of the question presented was the sole basis for its decision. The court reversed the district court's grant of summary judgment for Mount Lemmon solely because it held that the ADEA's 20-employee minimum was inapplicable to State political subdivisions. Pet. App. 17a. And in doing so, the Ninth Circuit expressly acknowledged its deliberate departure from the holdings of the Sixth, Seventh, Eighth, and Tenth Circuits. This case is thus a particularly clean vehicle for this Court's review.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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October 18, 2017

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN GUIDO; DENNIS RANKIN, *Plaintiffs–Appellants,* v. MOUNT LEMMON FIRE DISTRICT, *Defendant–Appellee.*	No. 15-15030 D.C. No. 4:13-cv-00216-JAS OPINION

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted December 15, 2016
San Francisco, California

Filed June 19, 2017

Before: Diarmuid F. O'Scannlain, Ronald M. Gould, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge O'Scannlain

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APPENDIX A

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Opinion by Judge O'Scannlain

SUMMARY*

Employment Discrimination

The panel reversed the district court's summary judgment in favor of the defendant fire district, a political subdivision of Arizona, in an action brought by two firefighter captains under the Age Discrimination in Employment Act.

Disagreeing with other circuits, the panel held that a political subdivision of a State need not have twenty or more employees in order to qualify as an employer subject to the requirements of the ADEA. The panel remanded the case for further proceedings.

COUNSEL

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Anne Noel Occhialino (argued), Attorney; Jennifer S. Goldstein, Associate General Counsel; P. David Lopez, General Counsel; Office of General Counsel,

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Equal Employment Opportunity Commission, Washington, D.C.; for Amicus Curiae Equal Employment Opportunity Commission.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the Age Discrimination in Employment Act of 1967 applies to a political subdivision of Arizona.

I

John Guido and Dennis Rankin were both hired in 2000 by Mount Lemmon Fire District, a political subdivision of the State of Arizona. Guido and Rankin served as full-time firefighter Captains. They were the two oldest full-time employees at the Fire District when they were terminated on June 15, 2009, Guido at forty-six years of age and Rankin at fifty-four.

Guido and Rankin subsequently filed charges of age discrimination against the Fire District with the Equal Employment Opportunity Commission ("EEOC"), which issued separate favorable rulings for each, finding reasonable cause to believe the Fire District violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"). They then filed this suit for age discrimination against the Fire District in April 2013.

The district court granted the Fire District's motion for summary judgment, concluding that it was not an "employer" within the meaning of the ADEA.

Guido and Rankin timely appealed.

II

Guido and Rankin challenge the district court's conclusion that the Fire District was not an "employer" within the meaning of the ADEA.

A

The ADEA applies only to an "employer." Under 29 U.S.C. § 630(b):

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Under § 630(a):

> The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

The parties agree that the twenty-employee minimum applies to "a person engaged in an industry affecting commerce" and that the term "person" does not include a political subdivision of a State. However, they dispute whether the twenty-employee minimum also applies to a "political subdivision of a State." § 630(b).

B

Congress passed the ADEA to protect older workers from "arbitrary age discrimination in employment."[1] 29 U.S.C. § 621(b). The statute originally applied only to private-sector employers. *See* Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law* 11 (1973) (the "Senate Age Discrimination Report"). Congress amended the ADEA in 1974 to extend coverage to States, political subdivisions of States, and other

---

[1] We "begin [our analysis] with the plain language of the statute." *Negusie v. Holder*, 555 U.S. 511, 542 (2009). If the "statutory text is plain and unambiguous[,]" we "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). "Only when statutes are ambiguous may courts look to legislative history." *In re Del Biaggio*, 834 F.3d 1003, 1010 (9th Cir. 2016) (citing *Nakano v. United States*, 742 F.3d 1208, 1214 (9th Cir. 2014)).

State-related entities by adding a second sentence to § 630(b). Pub. L. No. 93-259, § 28, 88 Stat. 55 (1974) (the "1974 ADEA Amendment").[2]

1

Guido and Rankin contend that § 630(b) is not ambiguous and applies to the Fire District. They assert that its plain meaning creates distinct categories of "employers" and that the Fire District fits within one of them. *See Young v. Sedgwick County*, 660 F. Supp. 918, 924 (D. Kan. 1987); *see also EEOC v. Wyoming*, 460 U.S. 226, 233 (1983) ("In 1974, Congress extended the substantive prohibitions of the [ADEA] to employers having at least 20 workers, *and* to the Federal and State Governments." (emphasis added)). Section 630(b), they argue, is deconstructed as follows: The term "employer" means [A—person] and also means (1) [B—agent of person] and (2) [C—State-affiliated entities].

They note that each of the three "employer" categories is then further defined. For example, the "person" category is elaborated upon in § 630(a), which provides multiple definitions of the term "person" and then narrows the category to those persons "engaged in an industry affecting commerce who has twenty or more employees for each working

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[2] The 1974 ADEA Amendment also lowered the employee minimum from twenty-five to twenty.

day."[3] The "State-affiliated entities" category lists the various types of State-affiliated entities covered, such as a "political subdivision of a State," and also contains clarifying language.

a

They argue that the ordinary meaning of "also" supports the notion that there are three distinct categories. *See Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009). We agree. The word "also" is a term of enhancement; it means "in addition; besides" and "likewise; too." *E.g.*, Webster's New Collegiate Dictionary 34 (1973). As used in this context, "also" adds another definition to a previous definition of a term—it does not clarify the previous definition. *See Holloway v. Water Works & Sewer Bd. of Town of Vernon*, 24 F. Supp. 3d 1112, 1117 (N.D. Ala. 2014) (concluding the twenty-employee limitation should not be imported into the definition of employer covering political subdivisions of a state); *see also Johnson v. Mayor & City Council of Baltimore*, 472 U.S. 353, 356 (1985) ("[I]n 1974 Congress extended coverage to Federal, State, and local Governments, *and* to employers with at least 20 workers." (emphasis added)).

For example, imagine someone saying: "The password can be an even number. The password can

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[3] Agents of persons and political subdivisions are not defined as persons in § 630(a), thus explaining why they have to be included as separate definitions of employers in § 630(b).

also be an odd number greater than one hundred."[4] These are two separate definitions of what an acceptable password can be, and the clarifying language does not apply to both definitions. If the sentences are reversed,[5] the "greater than one hundred" limiting language would still not carry over to the second sentence discussing even numbers. *See Holloway*, 24 F. Supp. 3d at 1117. This becomes more obvious when it would be illogical to carry clarifying language over. If a statute said "The word bank means 'the rising ground bordering a lake, river, or sea' and the word also means 'a place where something is held available,'" the second definition would not be describing a place that must border a lake, river, or sea. Merriam-Webster, https://www.merriam-webster.com/dictionary/bank. The phrase "also means" indicates that a second, *additional* definition is being described. *See* § 630(b) (using the phrase "also means").

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[4] If someone said "a password can be any even number," the ordinary meaning of this sentence would be that an odd number cannot be a password. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (concluding that a statute that states a bankruptcy trustee has the right to recover but is silent regarding an administrative claimant should be read as not giving such claimant the same right); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (discussing the *expressio unius est exclusio alterius* canon) (2012).

[5] I.e., "The password can be an odd number greater than one hundred. It can also be an even number."

The EEOC, as amicus curiae, expressing its views in support of Guido and Rankin, contends that the English language provided Congress many ways to apply clarifying language across multiple definitions of a term, had it wanted to. The EEOC cites the 1972 amendment to Title VII of the Civil Rights Act of 1964 as an example (the "1972 Title VII Amendment"). This amendment extended Title VII protections to States and State-related entities, including political subdivisions of a State. Pub. L. 92-261, § 2, 86 Stat. 103 (codified as 42 U.S.C. § 2000e). The EEOC emphasizes that the 1972 Title VII Amendment used language making clear that the twenty-employee minimum applied to political subdivisions, stating:

> (a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions*, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees...

42 U.S.C. § 2000e (emphasis added). The EEOC argues that Congress knew how to use language to ensure that an employee minimum applied to political subdivisions when it wanted.[6] Congress could have also added the limiting language to each definition discussed in § 630(b), or at least to the definition covering political subdivisions, but it chose not to.[7]

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[6] Congress could have made the second sentence of § 630(b) the second sentence of § 630(a), not changed a word, and the twenty-employee minimum would clearly apply to political subdivisions. It would then have read as follows:

> (a) The term "person" means one or more individuals, partnerships, associations, labor organization, corporations, business trusts, legal representatives, or any organized group of persons. *The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.*
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year...

[7] Section 630(a)-(b) does such for private sector employers, defining "pereon" broadly—including labor organizations, partnerships, and business trusts—then defining the term employer to mean a person with at least twenty employees. That

In the face of such a strong textual argument, the Fire District has a powerful rebuttal: four other circuits have considered this issue and all have declared § 630(b) to be ambiguous. *Cink v. Grant County*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015); *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *E.E.O.C. v. Monclova Twp.*, 920 F.2d 360, 363 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270 (7th Cir. 1986).[8] *Cink*, *Palmer*, and *Monclova Township* all rely entirely on *Kelly's* reasoning regarding the statute's ambiguity.[9]

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structure ensures that the twenty-employee minimum limitation applies to all definitions of the term "person." § 630(b).

[8] Further, every circuit to consider the question of whether the twenty-employee minimum applies to the "agent" category has concluded that § 630(b) is ambiguous. *See Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (concluding Congress just intended "to incorporate respondeat superior liability into the statute"); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994).

[9] *Cink* analyzes the entire interpretation question in two sentences, adopting the reasoning of *Kelly* and the other circuits. 635 F. App'x at 474 n.5. *Palmer* concludes § 630(b) is ambiguous with one sentence of analysis, adopting the reasoning of *Schaefer v. Transportation Media, Inc.*, which itself had adopted the reasoning of *Kelly*. 859 F.2d 1251, 1254 (7th Cir. 1988) (citing *Kelly*, 801 F.2d 269). *Monclova Township* also adopts *Kelly's* reasoning about the provision being ambiguous without adding anything to the analysis. 920 F.2d at 362-63.

The Seventh Circuit in *Kelly* concluded the statute was ambiguous. While acknowledging that the categorical reading was a reasonable one, it concluded the plaintiff "weaken[ed] his argument that the statute is unambiguous by arguing that we should look at 'common sense' and congressional intent in deciding that the statute is unambiguous." 801 F.2d at 270. It is not clear to us why an appeal to "common sense" undermines this argument. Further, any appeal to congressional intent is a non-sequitur; it is not a factor that should affect the determination of whether a statute's plain meaning is ambiguous. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 391 (2012).

The *Kelly* opinion further supports its conclusion by stating that the defendant presented a reasonable alternative construction:

> More significantly, the Park District enunciates another fair and reasonable interpretation of section 630(b)—that Congress, in amending section 630(b), merely intended to make it clear that states and their political subdivisions are to be *included* in the definition of 'employer,' as opposed to being a separate definition of employer.

Id. at 270-71. Since the alternative reading was also deemed reasonable, the court concluded the statute was ambiguous. *Id.* at 270.

A serious problem with the alternative interpretation argument, however; is that the court in

Kelly never explained how it is a "fair and reasonable interpretation" of the statute's actual language. A statute must be "susceptible to more than one reasonable interpretation" to be ambiguous. *Alaska Wilderness League v. E.P.A.*, 727 F.3d 934, 938 (9th Cir. 2013). But, declaring that multiple reasonable interpretations exist does not make it so. None of the cases cited by the Fire District elaborate on how and why this alternative interpretation is a reasonable one—they simply declare it so.

As a matter of plain meaning, the argument that § 630(b) can be reasonably interpreted to include its second sentence definitions within its first is underwhelming. If Congress had wanted to include the second sentence definitions of employer in the first sentence, it could have used the word "include" or utilized one of the other alternative constructions described above. The word "also" is not used in common speech to mean "includes." Webster's New Collegiate Dictionary 34 (1973). As previously described, the use of separate sentences and the word "also" combine to create distinct categories, in which clarifying language for one category does not apply to other categories. *See United States v. Rentz*, 777 F.3d 1105, 1109 (10th Cir. 2015) ("[U]ntil a clue emerges suggesting otherwise, it's not unreasonable to think that Congress used the English language according to its conventions."). Even the Supreme Court defaults into the categorical approach when discussing the statute. *E.g.*, *Wyoming*, 460 U.S. at 233; *Johnson*, 472 U.S. at 356.

We are persuaded that the meaning of § 630(b) is not ambiguous. The twenty-employee minimum does not apply to definitions in the second sentence and there is no reason to depart from the statute's plain meaning. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). We are satisfied that our reading comports with *Lamie* and certainly does not threaten to destroy the entire statutory scheme. *See King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (preventing the destruction of the statutory scheme may justify departing from "the most natural reading of the pertinent statutory phrase"). Courts should rarely depart from a statute's clear meaning because it risks creating a perception that they are inserting their own policy preferences into a law. *See id.* at 2495-96 (citing *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939)). Here, there is no valid justification to depart from the plain meaning of the language and to adopt another interpretation.

C

Even if we agreed with the Fire District and concluded that the statute is ambiguous—which we do not—the outcome would not change. The best reading of the statute would be that the twenty-employee minimum does not apply to a political subdivision of a State. We reject the Fire District's contention that considering the legislative history

Kelly reviewed should lead us to an alternative interpretation.

After concluding that the statute is ambiguous, *Kelly* relied on "the parallel [1972] amendment of Title VII" and the legislative history around the 1974 Amendment to conclude "that Congress intended section 630(h) to apply the same coverage to both public and private employees." 801 F.2d at 271-72. *Kelly's* focus on divining congressional intent, rather than determining the ordinary meaning of the text, led it astray. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 102 (2008) ("We have to read [the ADEA] the way Congress wrote it."); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 391 (critiquing those who think "that the purpose of interpretation is to discover intent"). We need not read minds to read text.

Both parties argue that the 1972 Title VII Amendment supports their position. But, critically, Congress used different language than it used in the 1974 ADEA Amendment, which changes the ADEA's meaning relative to Title VII, and such Congressional choice must be respected. *See Univ. of Tex. SW Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528-29 (2013). If Congress had wanted the 1974 ADEA Amendment to achieve the same result as the 1972 Title VII Amendment, it could have used the same language.

Nor does the legislative history *Kelly* relies on address the specific question before us. *Kelly*, 801 F.2d at 271-72. It references a Senate report written a year before the bill was passed discussing how the same set of rules should apply to the private sector

and the government. *Id.* (citing Senate Age Discrimination Report at 17). The Senate report never states that the twenty-employee minimum should apply to political subdivisions, but it does "urge that the law be extended ... to include (1) Federal, State, and local governmental employees, *and* (2) employers with 20 or more employees." Senate Age Discrimination Report at 18 (emphasis added). It also cites a House report containing the same vague language about ensuring the same rules apply and two floor statements by Senator Bentsen, one of which occurred in 1972, arguing that the amendment is needed so that government employees receive the "same protection." *Id.* (citing H.R. Rep. No. 93-913 (1974); 118 Cong. Rec. 15,895 (1972); 120 Cong. Rec. 8768 (1974)).

Eventually, the *Kelly* court resorted to arguing that given its perception of Congressional intent, Congress could not have intended what it said. 801 F.2d at 273 ("We also believe that applying the ADEA to government employers with less than twenty employees would lead to some anomalous results which we do not believe Congress would have intended."). However, there are plenty of perfectly valid reasons why Congress could have structured the statute the way it did.[10] In any event, it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute, apparent

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[10] One can imagine policy reasons for all these choices. Perhaps Congress thinks that government agencies, even very small ones like the Fire District, can better bear the costs of lawsuits than small private-sector businesses or that government should be a model of non-discrimination.

anomalies or not. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014).

III

The district court erred in concluding that the twenty-employee minimum applies to political subdivisions; it does not. Therefore, the order granting summary judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

John Guido, et al., Plaintiffs, v. Mount Lemmon Fire District, Defendant.	No. CV-13-00216-TUC-JAS **ORDER**

Pending before the Court is Defendant's motion for summary judgment and Plaintiffs' cross-motion for partial summary judgment.[1] For the reasons stated below, Defendant's motion for summary judgment is granted and Plaintiffs' cross-motion for partial summary judgment is denied.

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit

[1] As the Court would not find oral argument helpful in resolving this matter, oral argument is denied.

under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).[2] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* Thus, the "mere scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment. *Id.* at 252. However, in evaluating a motion for summary judgment, "the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

BACKGROUND

Plaintiffs John Guido and Dennis Rankin began working for Defendant Mount Lemmon Fire District in 2000. The position each held was Firefighter EMT. In 2005, both Guido and Rankin were promoted to the rank of Captain. On June 15, 2009, Guido and Rankin were laid off; Rankin was in his fifties and Guido was in his forties at the time of the layoffs. On July 28, 2009, Guido and Rankin each filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission alleging that Defendant discriminated against them on the basis of age. Thereafter, on April 1, 2013, Plaintiffs filed a Complaint in this case alleging that they were terminated in violation of the Age Discrimination in

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[2] When citing and quoting cases throughout this Order, internal quotes and citations have been omitted unless otherwise noted by the Court.

Employment Act ("ADEA") which prohibits discrimination against employees 40 and older on the basis of their age.[3]

DISCUSSION

Political Subdivisions and the 20 Employee Requirement

Defendant argues that this case is subject to dismissal as the ADEA only applies to employers that have 20 or more employees, and the undisputed facts

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[3] The Court has omitted a detailed discussion of the parties' factual positions pertaining to the underlying merits of the case as this case is subject to dismissal on other grounds (i.e., the ADEA does not apply as Defendant did not have 20 or more employees during the relevant time period as required by the ADEA). In a nutshell, Plaintiffs argue they were very experienced, qualified, and received positive performance evaluations; they were over 40 when they were laid off and were the oldest full-time employees at the time; they were replaced by substantially younger and less qualified individuals; and Defendant's reasons for their layoffs are pretext. In contrast, Defendant argues that it had been facing a budget crisis for several years; it was forced to lay off employees due to lack of funding; that Plaintiffs were eventually laid off as they were asked (like all other firefighters) to help increase funding by participating in wild land fire assignments which brought in extra money for Defendant (but Plaintiffs failed to participate in such assignments unlike other firefighters who did participate to bring in extra funding); and there is otherwise no evidence of age discrimination as Defendant hired Rankin when he was 46 years old, promoted Guido and Rankin to Captains in 2005 (when Guido was 42 years old and Rankin was 50 years old), they were laid off only four years after they had been promoted, and the same person that hired and promoted them also laid them off.

show that Defendant never had 20 or more employees during the relevant time period in this case. In contrast, Plaintiffs argue that Defendant's argument must fail as the 20 employee requirement does not apply to political subdivisions such as Defendant. A review of the pertinent authority reflects that the 20 employee requirement applies to political subdivisions.

The ADEA defines an employer subject to the provisions of the ADEA as: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States." 29 U.S.C. 630(b) (emphasis in the original).

Plaintiff argues that the clear language of the statute reflects that if an entity is a political subdivision, it automatically qualifies as an "employer" under the statute, and the 20 employee requirement is not imported into the provision pertaining to political subdivisions. Although the Ninth Circuit has not addressed this issue, Defendant correctly argues that the Circuit Courts that have directly addressed this issue have consistently

rejected the position advanced by Plaintiff, and have found that the 20 employee requirement does apply to political subdivisions. The Seventh Circuit was the first Circuit Court to address this issue. See *Kelly v. Wauconda Park District*, 801 F.2d 269 (7th Cir. 1986). The plaintiff in *Kelly* presented the same argument as Plaintiff in this case: that the clear language of the statute reflects that the 20 employee requirement does not apply to political subdivisions. The defendant in *Kelly* argued that in amending and expanding the statute from applying to just private employers to also government employers, Congress applied the 20 employee requirement to government employers as well. The Seventh Circuit resolved the issue as follows:

> The first issue we must decide is whether the definition of employer in section 630 is ambiguous. If the plain language of the statute is clear, we do not look beyond those words to interpret the statute ... When the statute's language is ambiguous, we look to the legislative history of the statute to guide our interpretation ... Kelly argues that, by setting state and political subdivisions in a separate sentence, Congress unambiguously indicated that government employers were a separate category of employers not subject to the twenty-employee minimum. Although Kelly's reading of the statute is certainly a fair and reasonable one, we disagree that the language is capable of

only that interpretation ... [Defendant] enunciates another fair and reasonable interpretation of section 630(b)—that Congress, in amending section 630(b), merely intended to make it clear that states and their political subdivisions are to be included in the definition of "employer," as opposed to being a separate definition of employer. Under this interpretation, government employers would be subject to the same limits as other employers. Because both Kelly and [defendant] present reasonable, but conflicting, interpretations of the plain meaning of section 630(b), we cannot say that the statute is unambiguous. We therefore must look to the legislative history to guide our interpretation ... [T]he legislative history of ... the ADEA ... indicate[s] that Congress's main purpose in amending the [ADEA] was to put public and private employers on the same footing. The Senate Special Committee on Aging supported extending the ADEA because "it is difficult to see why one set of rules should apply to private industry and varying standards to government" ... Both the Senate Special Committee on Aging Report and the House Report supporting the ADEA amendment, ... recommended adding public employers to the ADEA

as well as lowering the minimum number of employees from twenty-five to twenty. Neither report drew any distinction between the coverage of public and private employers ... Following the 1974 ADEA amendment, Senator Bentsen stated that "[t]he passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector ... [T]he final enactment of the ADEA amendment in 1974 completed coverage of public employees on the same basis as private employees ... In the face of this evidence that Congress intended section 630(b) to apply the same coverage to both public and private employees, Kelly fails to offer any evidence from the legislative record of the 1974 ADEA amendment which supports his interpretation of section 630(b) ... [T]he relevant legislative history discussed above firmly indicates that Congress intended the ADEA ... [to subject] public and private employers to the same employment discrimination coverage ... Congress intended the ADEA amendment to cover public and private employers equally ... [T]he legislative history of the statute, which

> we find supports the [defendant's] reading of the statute, i.e., that the twenty-employee minimum applies to government employers. Because [defendant] has never employed twenty employees, the district court's decision to dismiss Kelly's complaint is affirmed.

Id. at 270-73. Other Circuits that have addressed the issue have agreed with Kelly that the statute is ambiguous, that the legislative history reflects that Congress intended the 20 employee requirement to apply to government employers, and that the 20 employee requirement applies to political subdivisions. *See Palmer v. Arkansas Council on Economic Education*, 154 F.3d 892, 896 (8th Cir. 1998); *E.E.O.C. v. Monclova Township*, 920 F.2d 360, 363 (6th Cir. 1990). The Court finds this Circuit authority persuasive, and likewise finds that the 20 employee requirement applies to political subdivisions such as Defendant.[4] As such, unless

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[4] The Court notes that the only case Plaintiffs cite to support their position is from the Northern District of Alabama. *See Holloway v. Water Works and Sewer Board Of the Town of Vernon*, 2014 WL 2566066, *5 (N.D.Ala. May 15, 2014). While this case does support Plaintiff's position, it is contrary to the consistent line of Circuit Court cases that have addressed the issue, and the Court finds these decisions more persuasive. In addition, the Court notes that the *Holloway* case does not explain why the analysis in the Circuit Court cases is inapplicable; *Holloway* summarily states that the statute is clear that the 20 employee requirement is inapplicable to political subdivisions, and therefore there was no need to address the

there is an issue of fact as to whether Defendant fell within the 20 employee requirement during the pertinent timeframe (i.e., 2008 and 2009), Plaintiffs' case must be dismissed.

Qualifying Employees for 2008 and 2009

At most, Defendant argues that the undisputed facts show that Defendant had no more than 19 qualifying employees in both 2008 and 2009. Defendant submits records from the Arizona Department of Economic Security reflecting that in 2008 and 2009, Defendant only paid a total of 19 individuals for performing full and part-time work for Defendant.[5] As such, as Defendant did not have the minimum 20 employees for 2008 and 2009, Defendant is not subject to the ADEA such that this case must be dismissed. The Court agrees.

Plaintiffs argue that despite the undisputed facts for 2008 and 2009 from the Arizona Department of Economic Security that Defendant only paid a total of 19 individuals for performing full and part-time work for Defendant, the 20 employee requirement is still met on other grounds. Plaintiffs assert that because Defendant simply had 20 or more employees

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legislative history discussed in *Kelly*, *Palmer*, and *Monclova Township*. *See id.* at 5 n. 3.

[5] In 2008, Defendant had potentially 13 individuals work the requisite 20 weeks, and in 2009, Defendant had potentially 10 individuals work the requisite 20 weeks. In any event, in both 2008 and 2009, there were a total of 19 individuals that actually worked and received wages from Defendant.

listed on its payroll in 2008 and 2009 (i.e., the payroll list happened to include individuals who were reserve/seasonal and volunteer firefighters that performed no work and received no pay in 2008 and 2009), that fact alone is enough to meet the 20 employee requirement even if less than 20 individuals actually performed work and were paid by Defendant in 2008 and 2009. To support this argument, Plaintiff quotes the following statement from a Supreme Court case addressing the minimum employee requirement in Title VII:

> Metropolitan contends that if one were asked how many employees he had for a given working day, he would give as the answer the number of employees who were actually performing work on that day. That is possibly so. Language is a subtle enough thing that the phrase "have an employee for a given working day" (as opposed to "have an employee on a given day") may be thought to convey the idea that the employee must actually be working on the day in question. But no one before us urges that interpretation of the language, which would count even salaried employees only on days that they are actually working. Such a disposition is so improbable and so impossible to administer (few employers keep daily attendance records of all their salaried employees) that Congress should be thought to have prescribed it only if the language

> could bear no other meaning ... Under the interpretation we adopt, by contrast, all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when. He is counted as an employee for each working day after arrival and before departure.

Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 208-211 (1997)(emphasis added); Plaintiffs' Response (Doc. 71) at p. 10; Plaintiffs' Reply in Support of Cross-Motion for Summary Judgment (Doc. 79) at p. 3.

A closer review of the *Walters* case shows that it does not support Plaintiffs' position. The *Walters* case dealt with a similar provision contained in Title VII of the Civil Rights Act of 1964 (dealing with race, sex, and national origin discrimination) which stated that Title VII only applies to an employer who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.* at 204. The question presented was "whether an employer 'has' an employee on any working day on which the employer maintains an employment relationship with the employee, or only on working days on which the employee is actually receiving compensation from the employer." *Id.* This question arose because "Metropolitan's 'working days are Monday through Friday, and the 'current' and 'preceding' calendar years for purposes of the retaliatory-discharge claim are 1990 and 1989. The parties have stipulated that

Metropolitan failed to satisfy the 15-employee threshold in 1989. During most of 1990, Metropolitan had between 15 and 17 employees on its payroll on each working day; but in only nine weeks of the year was it actually compensating 15 or more employees on each working day (including paid leave as compensation). The difference resulted from the fact that Metropolitan had two part-time hourly employees who ordinarily skipped one working day each week." *Id.* at 205 (emphasis added). Due to the two part-time hourly employees who ordinarily skipped one working day each week (but, were nonetheless consistently performing work for Metropolitan and were actually being paid throughout 1990), Metropolitan argued that it was only compensating 15 or more employees on each working day for only nine weeks of the year, and therefore it should not be considered an employer covered by Title VII. As noted above, the Supreme Court rejected this position as reflected in the portion of the opinion quoted by Plaintiffs.

The Supreme Court emphasized, and the parties therein agreed, that the dispositive issue as to whether an employer had the minimum number of employees for the requisite 20 weeks was not whether an individual was being paid by the employer on a particular day, but whether the employer and the individual had an "employment relationship" on a particular day. *Id.* at 207. While the Supreme Court did state that an employment relationship is often "most readily demonstrated by the individual's appearance on the employer's payroll," the Supreme Court did not state that an individual is automatically considered an employee based solely on the fact that

the individual appears on the employer's payroll. *See id.* at 206-212. Furthermore, the Supreme Court certainly did not state that an individual appearing on an employer's payroll is considered an employee even if that individual did not perform work and receive pay from the employer during the pertinent time frame. *See id.* Thus, while an employment relationship is most often demonstrated by looking "first and primarily to whether the individual in question appears on the employer's payroll ... what is ultimately critical ... is the existence of an employment relationship ... under traditional principles of agency law ... [T]he ultimate touchstone ... is whether an employer has employment relationships with [the minimum number of employees required by the statute] for each working day in 20 or more weeks during the year[s] in question." *Id.* 211-212. In light of the foregoing, Plaintiffs' argument that the 20 employee requirement is met because Defendant had 20 or more employees listed on its payroll in 2008 and 2009 (i.e., including reserve and volunteer firefighters that performed no work and received no pay in 2008 and 2009) is rejected. Unlike the individuals in *Walters* who actually performed part-time work and were paid during the pertinent time frame, the individuals Plaintiffs seek to include to meet the 20 employee requirement did not perform work and get paid by Defendant in 2008 and 2009. Thus, just because these individuals happen to appear on Defendant's Unemployment Tax and Wage Reports from the Arizona Department of Economic Security does not show they had the requisite employment relationship for purposes of the ADEA (especially in the

circumstances at bar). Rather, there is no evidence of an employment relationship between Defendant and these individuals who did not perform work and get paid by Defendant in 2008 and 2009.

Lastly, Plaintiffs argue that Defendant's volunteer firefighters should be considered employees for purposes of the ADEA; if this were the case, the 20 employee requirement could be satisfied for 2008 and 2009. The only authority Plaintiffs cite to support its position is A.R.S § 23-901(d) which is a provision of Arizona's workers' compensation statute which simply includes volunteer firefighters in its definition of employees. This provision, however, does not establish that individuals listed as volunteer firefighters for Defendant are employees for purposes of the federal ADEA; Plaintiffs have not cited any case law to support their position that the volunteers at issue qualify as employees under the ADEA. Defendant, however, cites case law to support its position that the volunteers in this case do not qualify as employees under the ADEA.[6]

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[6] The parties have not cited, nor has the Court found, published Ninth Circuit case law on point dealing with the volunteer issues at bar. Defendant did cite a brief, unpublished Ninth Circuit case discussing whether a volunteer police officer could be considered an employee under Title VII. *See Waisgerber v. City of Los Angeles*, 406 Fed.Appx. 150 (9th Cir. 2010) (unpublished disposition). Although such unpublished authority is not precedent (*see* Ninth Circuit Rule 36-3), the Court notes that *Waisberger* stated that the plaintiff (an unpaid volunteer) could possibly amend her complaint to allege the "substantial benefits necessary to make her an employee under Title VII." *Id.* at 152. The *Waisberger* case involved unique circumstances where the trial court granted the defendant's motion to dismiss the

Courts have held that volunteers can potentially qualify as employees under federal discrimination statutes such as Title VII[7] where the volunteer is "entitled to significant [or substantial] benefits." *See Pietras v. Board of Fire Com'rs of Farmingville Fire Dist.*, 180 F.3d 468, 473 (2nd Cir. 1999) ("[T]he question of whether someone is or is not an employee under Title VII usually turns on whether he or she has received direct or indirect remuneration from the alleged employer ... [A]n employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits ... We conclude ... that a non-salaried volunteer firefighter's employment status under Title VII is a fact question when that firefighter is entitled to significant benefits."); *U.S. v. City of New York*, 359 F.3d 83, 91-92 (2nd Cir. 2004)(To show that they were "employees" for purposes of Title VII, plaintiffs participating in New York's work experience program "must establish that [they] received remuneration in some form for [their] work ... This remuneration need not be a salary ... but must consist of substantial

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complaint where plaintiff's counsel did not oppose the motion or appear at the hearing; unbeknownst to the trial court and defense counsel at the time, plaintiff's counsel did not file an opposition or appear at the hearing because she was dying of brain cancer during the relevant period. *See id.* at 151.

[7] Title VII and the ADEA both define "employee" (in a very circular manner) as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. § 630(f) (ADEA).

benefits not merely incidental to the activity performed...").

In *Pietras v. Board of Fire Com'rs of Farmingville Fire Dist.*, the plaintiff was a volunteer probationary firefighter (i.e., trainee) with the Farmingville Fire District; she alleged that the physical agility test that she was required to pass in order to become a full-fledged volunteer firefighter had a disparate impact on women. *See Pietras*, 180 F.3d at 470-71. Although she was not paid, the court held that there was an issue of fact as to whether Pietras could be considered an employee for purposes of Title VII as she "was entitled to numerous firefighter benefits [as a trainee which included]: 1) a retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits." *Id.; see also Haavistola v. Community Fire Company of Rising*, 6 F.3d 211, 221 (4th Cir. 1993) (finding that there was an issue of fact as to whether a volunteer firefighter was an employee under Title VII where she "received the following benefits ... with the Fire Company: state-funded disability pension ... survivors' benefits for dependents ... scholarships for dependents upon disability or death ... bestowal of a state flag to family upon death in the line of duty ... benefits under the Federal Public Safety Officers' Benefits Act when on duty ... group life insurance ... tuition reimbursement for courses in emergency medical and fire service techniques ... coverage under Maryland's Workers Compensation Act ... tax-exemptions for unreimbursed travel expenses ... ability to purchase, without paying extra fees, a special commemorative registration plate for private vehicles ... and access to

a method by which she may obtain certification as a paramedic.").

In *Jacob-Mua v. Veneman*, 289 F.3d 517, 521 (8th Cir. 2002)[8], the court held that a volunteer researcher with the Department of Agriculture could not be considered an employee under Title VII as she "was not paid, did not receive annual and sick leave benefits or coverage ... and she was not entitled to merit promotion, holiday pay, insurance benefits, or competitive status." The court also rejected her claim that the research and experience she obtained for her dissertation via her volunteer work counted as sufficient compensation to be considered an employee; the court found that case law did not support her position. *See id.* In *Evans v. Wilkinson*, 609 F.Supp.2d 489 (D.Md. 2009), the plaintiff was a volunteer emergency medical technician ("EMT") with the Lexington Park Volunteer Rescue Squad ("VRS"); the plaintiff alleged that VRS revoked her EMT privileges in violation of Title VII and the ADEA. *See id.* at 490. Although she received no salary, the plaintiff alleged that she qualified as an employee under the discrimination statutes because certain benefits were available to her which included a "Length of Service Program"; a first-time homeowner's assistance program; and a scholarship program. *Id.* at 494. The court found that these possible benefits were insufficient to qualify her as an employee under Title VII and the ADEA. As to the Length of Service Program, it provided that volunteers who have

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[8] Abrogated on other grounds, *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011).

reached the ages of 55 or 60, completed at least 20 years of certified active volunteer service, and had accumulated a minimum of 50 points per calendar year in volunteer service, would receive a monthly payment of either $125 or $175 for the remainder of their life; it also provided for monetary payments if the volunteer, who is otherwise eligible for the monthly payments, became disabled or died during the course of volunteer service. *Id.* at 494-495. In finding that this Length of Service Program was too conditional and minor to characterize the plaintiff as an employee, the court stressed "that monthly payments under this Length of Service Program are not guaranteed by any means; Plaintiff herself would be required to render a minimum of 20 years of additional certified active volunteer service in addition to accumulating a minimum of the 50 required points per calendar points in accordance with the program's description ... [T]he length of service program d[oes] not constitute the sort of guaranteed remuneration which establish[s] an employer-employee relationship ... [It does] not provide a guarantee of consideration for the work performed as it was not provided in a contemporaneous fashion, which result[s] in little or no economic dependence by most volunteer firefighters because one could forfeit the benefit by failing to reach the threshold age, completing the requisite number of years in service or earning the requisite number of points per year." *Id.* Likewise, as to the first-time homeowner's assistance program and scholarship program that were available to volunteers such as the plaintiff, volunteers still had to apply and qualify for these benefits which were not

by any means guaranteed to volunteers. The court found that the benefits at issue were too conditional and minor to qualify the plaintiff as an employee under Title VII or the ADEA. See *id.* at 494-496.

In the case at bar, Plaintiffs argue that volunteers for Defendant should be considered employees as they receive substantial benefits; for example, as referenced above, volunteer firefighters are included within the definition of employees in Arizona's workers' compensation statute, may receive a pension, and receive training and experience that could lead to full-time employment as a firefighter. The record reflects that most of the volunteers are either residents of Mount Lemmon, or young individuals looking for experience that could possibly lead to full-time employment with larger fire departments. While gaining experience through volunteering in the hope of obtaining full-time employment in the future is prudent, this is largely incidental to volunteer work in general, and is not a substantial benefit for purposes of being considered an employee under the ADEA based on the authority discussed herein. As to workers' compensation, there is no evidence or discussion of this issue in the record other than Plaintiffs pointing out that volunteers are included within the definition of employees under the pertinent statutory provision in A.R.S § 23-901(d). As to volunteers possibly receiving a pension, the pension at issue is very similar to the "Length of Service Program" discussed above in the *Evans* case. Arizona's volunteer pension provides a monthly pension not to exceed $400 based upon availability for volunteers who have served for 25-plus years, or who have reached age 60 and have served for 20-plus

years. *See* A.R.S. § 9-967(A). As pertinent to Defendant, the record reflects that there are a total of two volunteers who are receiving $125 per month relating to their volunteer service. In light of the foregoing, and as the volunteers at issue did not receive wages, health insurance, sick leave, or any other significant benefits from Defendant, the Court finds that Defendant is entitled to summary judgment as there is no material issue of fact supporting a finding that volunteers received substantial benefits from Defendant such that they could qualify as employees under the ADEA in this case. As Defendant did not have the required 20 employees during the relevant time frame, this case must be dismissed.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED as follows:

(1) Defendant's motion for summary judgment (Doc. 68) is granted, and Plaintiff's cross-motion for partial summary judgment (Doc. 71) is denied.

(2) This case is dismissed with prejudice. The Clerk of the Court shall enter judgment and close the file in this case.

Dated this 11th day of December, 2014.

/s/ James A. Soto
Honorable James A. Soto
United States District Judge

APPENDIX C

29 U.S.C. § 630

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or

employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively

seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between

a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the

duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

APPENDIX D

42 U.S.C. § 2000e

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for

employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor

organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign

country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the

basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,

Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

As of 2009, was the Mount Lemmon Fire District a covered "employer" under the Age Discrimination in Employment Act (ADEA)?

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STATEMENT OF THE CASE

1. Respondents John Guido and Dennis Rankin began working for petitioner Mount Lemmon Fire District in 2000. Pet. App. 19a. By 2009, the two men had risen from the rank of Firefighter EMT to Captain. *Id.* They were among the most accomplished employees in the Fire District: Mr. Rankin had been employed as a firefighter and arson investigator since 1973, while Mr. Guido was a former officer in the Arizona National Guard, a certified Senior Fire Inspector, and one of the Fire District's two certified paramedics. Pls.' Rule 56.1 Statement of Facts ¶¶ 6, 9, 10, 20. At ages forty-six and fifty-four, respectively, Mr. Guido and Mr. Rankin were also the Fire District's two oldest full-time employees. *Id.* ¶¶ 16, 26, 31.

In 2009, the Fire District confronted "a budget shortfall." Pet. 8. Fire Chief Dean Barnella, planning possible budget reductions, released a memorandum in March stating that "[p]aramedics have priority" for retention in the event of personnel reductions. *See* Pls.' Rule 56.1 Statement of Facts ¶ 38; Ex. 3 to Def.'s Rule 56.1 Statement of Facts. Nonetheless, three months later, Mr. Guido and Mr. Rankin were selected for dismissal. Compl. ¶ 25.

The Fire District has maintained that it selected Mr. Guido and Mr. Rankin for termination because they had not been "participating in wildland assignments"—voluntary shifts for fighting fires in areas of natural vegetation. *See* Def.'s Rule 56.1 Statement of Facts ¶ 20. Yet one of the employees that the Fire District tapped to replace Mr. Guido and Mr. Rankin as a ranking Captain had gone on no

such assignments in the preceding two years. Pls.' Rule 56.1 Statement of Facts ¶¶ 32, 47, 62-63.

Respondents filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that the Fire District, a political subdivision of the State of Arizona, had violated the Age Discrimination in Employment Act (ADEA) by firing them because of their ages. Pet. App. 3a; *see also* 29 U.S.C. § 623.

2. As originally enacted, the ADEA excluded political subdivisions from its coverage. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11(b), 81 Stat. 605. Two categories were covered "employer[s]" under the original ADEA: first, any "person engaged in an industry affecting commerce who ha[d] twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year," and second, "any agent of such a person." *Id.* The statute, in turn, defined "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." *Id.* § 11(a).

When Congress amended the ADEA in 1974, it made two changes to the Act's coverage provision. First, it lowered the numerosity requirement for private entities from twenty-five employees to twenty. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1)-(2), 88 Stat. 74 (codified as amended at 29 U.S.C. § 630(b)). Second—and central to this case—it added an additional category of "employer" lacking any reference to the statutory term "person": The amendment expressly provided

that "a State or political subdivision of a State" is "also" an employer. *Id.*

Those changes remain in effect today. Section 630(b) states in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency . . . .

3. After reviewing respondents' charges, the EEOC issued letters of determination finding reasonable cause to believe that the Fire District had fired Mr. Guido and Mr. Rankin in violation of the ADEA. Pet. App. 3a.

4. Mr. Guido and Mr. Rankin then filed suit in the United States District Court for the District of Arizona, alleging age discrimination under the ADEA.

After a period of discovery, the Fire District moved for summary judgment. Pet. App. 18a. It argued that "the ADEA only applies to employers that have 20 or more employees," *id.* 20a, and that the Fire District had only thirteen qualifying employees during the relevant period. Def.'s Mot. for Summ. J. 7. Mr. Rankin and Mr. Guido filed a cross-motion for partial summary judgment on the issue whether the Fire District is a covered "employer" under the ADEA. Pet. App. 18a. They argued that the "clear language of the statute" demonstrates that the

ADEA has no numerosity requirement with respect to political subdivisions. *Id.* 21a. At any rate, respondents maintained that the Fire District had more than twenty employees because it listed more than twenty firefighters on its wage reports and retained still others in a volunteer capacity. *Id.* 26a-27a, 30a-31a.

The district court granted the Fire District's motion. It held that the ADEA's numerosity requirement for private entities applies to political subdivisions like the Fire District. Pet. App. 25a-26a. The district court then concluded that the Fire District had "no more than 19 qualifying employees" because only nineteen of the firefighters on the wage reports had in fact worked and been paid during the relevant period, and none of the volunteers had received substantial benefits from the Fire District. *Id.* 26a, 31a-37a.

5. Mr. Guido and Mr. Rankin appealed, supported by an EEOC amicus brief maintaining that the ADEA covers "political subdivisions of any size." C.A. Br. of the EEOC as Amicus Curiae 5.

The Ninth Circuit agreed and unanimously reversed, holding that the ADEA applies to the Fire District. Pet. App. 17a. In an opinion by Judge O'Scannlain, the court of appeals held that Section 630(b)'s directive that employer "also means" a political subdivision of a state is unambiguous. *Id.* 14a. Because "also" means "in addition," and political subdivisions are covered in a separate sentence that includes no numerosity requirement, the court of appeals determined that text plainly sets out political subdivisions as a distinct category from

the category to which the numerosity requirement applies. *Id.* 13a.

The Ninth Circuit noted that a 1986 Seventh Circuit decision—and a few other cases "rely[ing] entirely" on that decision—had held otherwise. Pet. App. 11a (citing *Kelly v. Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986), and other cases). The Seventh Circuit deemed Section 630(b) "ambiguous" with respect to the coverage issue and relied on the statute's legislative history and a comparison to Title VII to conclude that "Congress intended section 630(b) to apply the same coverage to both public and private employees." *Kelly*, 801 F.2d at 270-73.

The Ninth Circuit, however, found *Kelly*'s reasoning "underwhelming." Pet. App. 13a. In particular, "*Kelly* never explained" how applying the numerosity requirement to the political subdivision clause of the ADEA is a "'reasonable interpretation' of the statute's actual language." *Id.* (quoting *Kelly*, 801 F.2d at 270). Accordingly, the court of appeals held that "there is no valid justification to depart from the plain meaning of the language and to adopt another interpretation." *Id.* 14a.

The Ninth Circuit also rejected the Fire District's arguments based on legislative history and congressional intent. The Senate report that accompanied the 1974 ADEA amendment, the court of appeals explained, "never states that the twenty-employee minimum should apply to political subdivisions." Pet. App. 16a. And the Ninth Circuit refused to presume that Congress intended the ADEA to track the coverage of Title VII. To the contrary, the court of appeals explained that where, as here, "Congress use[s] different language" in the ADEA

than it does in Title VII, "such Congressional choice must be respected." *Id.* 15a (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013)).

Given its holding that the twenty-employee minimum does not apply to political subdivisions, the Ninth Circuit did not reach respondents' alternative argument that the Fire District had at least twenty employees.

REASONS FOR DENYING THE WRIT

The Fire District contends that there is an "intractable" disagreement over whether the ADEA's numerosity requirement applies to state political subdivisions and that the Ninth Circuit erred in holding that it does not. Pet. 11, 21. There is, however, no conflict that warrants this Court's review. The Court's intervening precedents have eclipsed the decades-old opinions that the Fire District cites. And the Ninth Circuit correctly read the ADEA's plain text as covering political subdivisions regardless of size—as would any court that considered the issue today. Besides, the ADEA's numerosity requirement would have no discernable impact on the primary conduct of public employers, and questions regarding its applicability in this context rarely arise. This case is also a poor vehicle for resolving the issue. It is in an interlocutory posture, and there are alternative grounds on which the Court could affirm the Ninth Circuit's decision. The petition should be denied.

I. There is no conflict that warrants this Court's intervention.

The Fire District's assertion that the Ninth Circuit's holding conflicts with decisions from four

other circuits is overblown. Indeed, the Fire District itself attacks the Ninth Circuit's reasoning primarily on grounds *no* court has yet considered, much less adopted.

1. As an initial matter, the Tenth Circuit case the Fire District cites, *Cink v. Grant County*, 635 Fed. Appx. 470 (10th Cir. 2015), cannot be part of any split. *Cink* is unreported and, therefore, "is not binding precedent." *Id.* at 470 n.*. Moreover, the Tenth Circuit's discussion of whether a numerosity requirement applies to political subdivisions is dicta. The defendant in that case—Grant County, Oklahoma—did not claim to have fewer than twenty employees. *Id.* at 474 & n.5.

2. The three remaining cases that the Fire District cites were all decided decades ago: *Kelly v. Wauconda Park District*, 801 F.2d 269 (7th Cir. 1986), and two others that adopt *Kelly*'s holding without further analysis, *Palmer v. Arkansas Council on Economic Education*, 154 F.3d 892 (8th Cir. 1998), and *EEOC v. Monclova Township*, 920 F.2d 360 (6th Cir. 1990). In light of this Court's intervening precedent, it is unlikely that those courts would have reached the same conclusion today.

a. The Seventh Circuit in *Kelly* acknowledged that "Congress used different language in defining employers under Title VII, as opposed to the ADEA." 801 F.2d at 271. It nonetheless insisted on construing the two statutes identically in light of "'important similarities' in objectives, substantive prohibitions, and legislative histories." *Id.* (citation omitted).

Since *Kelly* and the decisions adopting its reasoning, however, this Court has repeatedly prohibited courts from assuming without "careful and

critical examination," *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008), that rules applicable to Title VII apply to the ADEA. Instead, courts now "must focus on the text" of each statute. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009).

In *Gross*, for example, a litigant "relie[d] on this Court's decisions construing Title VII for his interpretation of the ADEA." 557 U.S. at 173. The Court, however, refused to apply the Title VII rule to the ADEA because of "textual differences" in the relevant provisions of the two statutes. *Id.* at 175 & n.2. The Court "presumed" that Congress "ha[d] acted intentionally" when it amended the relevant Title VII provision but "neglected to add such a provision to the ADEA." *Id.* at 174. In other words, when there are differences between the texts of two federal antidiscrimination statutes, it is "incorrect to infer that Congress meant anything other than what the text does say." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013).

"[W]hatever the merits of *Kelly*'s reasoning in 1986, it cannot be reconciled with [these] recent Supreme Court cases emphasizing repeatedly that rules from one anti-discrimination statute cannot be mechanically applied to the other statute." C.A. Br. of the EEOC as Amicus Curiae 11. The Seventh Circuit has implicitly recognized as much. A "statute-by-statute approach," it has explained, is most "faithful to the *Gross* Court's close scrutiny of the relevant text." *Smith v. Wilson*, 705 F.3d 674, 681 (7th Cir. 2013); *see also Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012) (en banc) (recognizing in light of *Gross* that "[s]hared statutory purposes do not invariably lead to shared statutory texts, and in the end it is the text that matters"). And

that is the approach the Ninth Circuit followed here. *See* Pet. App. 15a (citing *Nassar*, 133 S. Ct. at 2528-29).

b. More broadly, *Kelly* used an approach to statutory text that was common in 1986 but is no longer appropriate. The Seventh Circuit made no serious attempt to grapple with the ADEA's word choice or grammar, relegating its textual analysis to a mere footnote. *See Kelly*, 801 F.2d at 270-71 & n.1. Instead, it pronounced the statute ambiguous based on the abstract "reasonable[ness]" of applying the numerosity requirement to political subdivisions. *Id.* at 270-71. The Seventh Circuit then turned to a lengthy rendition of "the legislative history of the statute," from which it deduced that Congress's "main purpose" in amending the ADEA supported imposing a twenty-employee requirement. *Id.*

This Court has since shunned that approach to statutory interpretation. "In the past, the Court itself had asserted judicial power to reshape the letter of the law to make it cohere better with broader legislative purposes." John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 4 (2014); *see also id.* at 16-17 (discussing examples up through 1989). "[T]oday's Court" generally "adher[es], instead, to the words of the statute." *Id.* at 4. It requires lower courts to consider the ordinary meaning of a statute's language and analyze its grammatical structure at a granular level before declaring ambiguity.

To select just one of scores of available examples: in *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), the Court unanimously reversed the lower court's determination that a

statutory provision was ambiguous. Rejecting the lower court's resort to congressional purpose and legislative history, the Court applied "basic rules of grammar" and the dictionary definitions of the terms "any" and "or" to conclude that the plain text of the statute governed. *Id.* at 131-33; *see also, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 569-73 (2011) (rejecting a "text-light approach to the statute" in favor of one derived from dictionary definitions and the use of a statutory word "as an adjective"). Even when a statute's plain text produces counterintuitive results, courts now must "enforc[e] the statutory text, warts and all." Manning, *The Means of Constitutional Power*, at 6; *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459-61 (2002).

As the Ninth Circuit recognized, "*Kelly*'s focus on divining congressional intent, rather than determining the ordinary meaning of the text" is out of step with current statutory interpretation case law. Pet. App. 15a. No court today would analyze statutory text the way the Seventh Circuit in 1986 approached the ADEA's coverage provision.

3. Implicitly recognizing that the reasoning of *Kelly* and the cases following it cannot be defended in today's jurisprudential landscape, the Fire District advances ten pages' worth of textual arguments in support of its position. *See* Pet. 21-31. But the Fire District presented none of these arguments to the Ninth Circuit. And no other court has addressed any of them either. If indeed "the question presented is sure to recur," *id.* 20, courts should be given time to consider the new arguments the Fire District makes.

In the meantime, allowing further percolation will subject no entities to conflicting obligations.

Unlike corporations, every political subdivision is necessarily confined to a particular state. Therefore, those employers are subject only to the law of a particular circuit, whatever it may be.

II. The question whether the ADEA's numerosity requirement applies to political subdivisions is not significant enough to merit review.

The question whether a numerosity requirement applies under the ADEA to political subdivisions does not affect employment practices in such subdivisions. Nor does the issue arise frequently in litigation.

A. The scope of the ADEA's coverage does not affect the primary conduct of political subdivisions.

1. Across the country, the question the Fire District presents lacks any real import because state laws typically forbid all political subdivisions—regardless of size—from discriminating against employees on the basis of age. Consider, for example, the Ninth Circuit, where the Fire District suggests that employers will face new burdens as a result of the decision here. *See* Pet. 20-21. Most of the states in the Ninth Circuit already have laws banning age discrimination that cover *all* employees of state and political subdivisions.[1] Only Arizona and Nevada have employee numerosity requirements that apply

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[1] *See* Alaska Stat. §§ 18.80.220(a), 18.80.300(5); Cal. Gov't Code §§ 12926(d), 12940(a); Haw. Rev. Stat. §§ 378-1, 378-2(a); Idaho Code §§ 67-5902(6), 67-5909; Mont. Code §§ 49-2-101(11), 49-2-303(1); Or. Rev. Stat. §§ 659A.001(4), 659A.030(1); Wash. Rev. Code § 49.44.090 & *Bennett v. Hardy*, 784 P.2d 1258, 1260 (Wash. 1990) (construing statute).

to political subdivisions. And even these states have lower thresholds than the twenty-employee limit the Fire District seeks here. *See* Ariz. Rev. Stat. §§ 41-1461(6), 41-1463(B) (fifteen employees); Nev. Rev. Stat. §§ 613.310(2), 613.310(6), 613.330(1) (same).

The same is true for the overwhelming majority of the states in the Sixth, Seventh, and Eighth Circuits, which the Fire District says are governed by the *Kelly* rule. The Fire District, for instance, expresses concern for political subdivisions in Illinois. *See* Pet. 20 n.5. But Illinois law already prohibits age discrimination by "any" political subdivision, "without regard to the number of employees." 775 Ill. Comp. Stat. 5/2-101(B)(1)(c); *see also id.* 5/1-102(A), 5/2-102(A). Indeed, all but three states in those circuits have laws that protect all employees of political subdivisions.[2] Two of the remaining three have numerosity requirements far lower than twenty. *See* Iowa Code § 216.6(1), (6) (four employees); Ky. Rev. Stat. §§ 344.030(2), 344.040 (eight). Only South Dakota does not independently protect employees from discrimination on the basis of age. *See* S.D. Codified Laws § 20-13-10.

2. In any event, the Fire District does not contend that political subdivisions with fewer than

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[2] Ark. Code §§ 21-3-201, 21-3-203; 775 Ill. Comp. Stat. 5/1-102(A), 5/2-101(B)(1)(c), 5/2-102(A); Ind. Code §§ 22-9-2-1, 22-9-2-2; Mich. Comp. Laws §§ 37.2201(a), 37.2202; Minn. Stat. §§ 363A.03(16), 363A.08; Mo. Rev. Stat. §§ 213.010(8), 213.055; Neb. Rev. Stat. §§ 48-1002(2), 48-1004; N.D. Cent. Code §§ 14-02.4-02(8), 14-02.4-0.3; Ohio Rev. Code §§ 4112.01(A)(2), 4112.14; Tenn. Code §§ 4-21-102(5), 4-21-407; Wis. Stat. §§ 111.32(6)(a), 111.321, 111.322.

twenty employees *want* to make employment decisions that the ADEA would otherwise prohibit. Rather, the Fire District identifies only one way in which the issue it raises purportedly affects the behavior of small political subdivisions—namely, that federal lawsuits against such entities would "threaten[] the continued availability" of local government services by imposing "new financial burdens" on the subdivisions. Pet. 21.

That argument is unfounded. The vast majority of public entities participate in insurance pools that cover employment discrimination lawsuits. Karen Nixon, Pub. Agency Risk Sharing Auth. of Cal., *Public Entity Pooling—Built to Last* 3 (Dec. 16, 2011), http://www.cajpa.org/documents/Public-Entity-Pooling-Built-to-Last.pdf (noting that 85% of counties, townships, municipalities, school districts, and special districts nationwide participate in risk pools). And the smaller the public employer, the more likely it is to be part of such a pool. Given the ubiquity of this insurance, any ADEA lawsuits that might be filed are unlikely to prevent small political subdivisions from fulfilling their missions.

B. The question presented does not arise frequently.

Notwithstanding the Fire District's back-of-the-envelope estimates regarding the number of political subdivisions, *see* Pet. 20, the question whether a numerosity requirement applies to such entities is rarely litigated. In the forty-three years since the ADEA's 1974 amendment, only four courts of appeals have needed to address the issue. *See supra* at 7.

There are good reasons why this is so. As just noted, state laws already typically bar all political

subdivisions from discriminating on the basis of age. And precisely because offices with fewer than twenty employees do not employ many workers, they will not generate many ADEA claims.

Even when someone who worked for a political subdivision with fewer than twenty employees brings an ADEA claim, it will often be immaterial whether the statute's numerosity requirement applies to political subdivisions. Employees who worked for these small political subdivisions may still bring suit under the ADEA against either (1) a larger, related entity or (2) the political subdivision itself if it is "integrated" with another office. The Tenth Circuit decision cited by the Fire District exemplifies the first point: The court held that an employee who worked in a sheriff's office with fewer than twenty employees could instead sue the county in which the office was located because the sheriff's office was a "subordinate department" of Grant County. *Cink v. Grant County*, 635 Fed. Appx. 470, 474-76 (10th Cir. 2015).

Second, an office with fewer than the requisite number of employees can sometimes itself be sued. The EEOC directs across all antidiscrimination statutes that even "[i]f an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an 'integrated enterprise' that, overall, meets the requirement." EEOC Compl. Man. § 2-III(B)(1)(a)(iii) (last updated 2009), https://www1.eeoc.gov/policy/docs/threshold.html. And numerous courts have found small employers to satisfy numerosity requirements on that ground. *See, e.g.*, *Echevarria v. Insight Med., P.C.*, 72 F. Supp. 3d 442, 454-56, 458-62 (S.D.N.Y. 2014) (holding that two employers should be considered a "single integrated employer"); *Arroyo-*

Pérez v. Demir Grp. Int'l, 762 F. Supp. 2d 374, 385-88 (D.P.R. 2011) (same); *French v. Idaho State AFL-CIO*, 164 F. Supp. 3d 1205, 1215 (D. Idaho 2016) (denying motion to dismiss on this basis).

The issue the Fire District presents is relevant, in short, only in the atypical circumstance when a political subdivision with fewer than twenty employees faces an ADEA lawsuit and does not have a relationship with another office that would bring the total number of employees over twenty.

III. The Ninth Circuit's decision is correct.

A. The plain language of the ADEA dictates that it covers all political subdivisions.

The plain language of the ADEA is unambiguous. The relevant provision first provides that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees." 29 U.S.C. § 630(b). It then says: "The term also means . . . (2) a State or political subdivision of a State." *Id.*

The "State or political subdivision of a State" clause, which was added through the 1974 amendment, makes clear that the ADEA covers political subdivisions regardless of size. The clause is set off by the word "also," and the ordinary meaning of "also" is "in addition." *See, e.g.*, American Heritage Dictionary 53 (4th ed. 2000); Random House Dictionary of the English Language 60 (2d ed. 1987). Furthermore, the clause—unlike the subsection covering private employers—lacks any language requiring a certain number of employees. Thus, as the Ninth Circuit recognized, the political subdivision clause brings a separate category of "employer"

within the statute's reach; "it does not clarify" the other categories. Pet. App. 7a.

This conclusion is reinforced by the fact that Congress clearly "knows how to impose" numerosity requirements on political subdivisions "when it wishes to do so," *Whitfield v. United States*, 543 U.S. 209, 216 (2005). Two years before the amendment adding the political subdivisions clause to the ADEA, Congress amended the text of Title VII to cover political subdivisions. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 80 Stat. 662 (codified as amended at 42 U.S.C. § 2000e). It did so not by creating another category of employer, but by adding "governments, governmental agencies, political subdivisions" into the provision defining "persons." Congress thereby guaranteed that Title VII's numerosity requirement would apply to those governmental "persons" as well. *Id.*

In the ADEA, Congress could have applied the numerosity requirement to public employers by adding the "State or political subdivision of a State" language to the definition of "person" in Section 630(a), as it had in Title VII. But Congress did not do so. Both "Congress' choice of words" and "its structural choices" are "presumed to be deliberate." *Univ. of Tex. Sw. Med. v. Nassar*, 133 S. Ct. 2517, 2529 (2013). A court may not "ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Gross v. FBL Fin. Servs.*, 557 U.S 167, 174 (2009). Therefore, the only reasonable conclusion is that the ADEA's numerosity requirement does not extend to political subdivisions.

B. The Fire District's counterarguments are unavailing.

The Fire District attacks the Ninth Circuit's analysis with various arguments based on (1) the ADEA's text and (2) the statute's legislative history. None of these arguments is availing.

1. *Text.* The Fire District advances three new textual arguments. If there were merit to these arguments, they would at best warrant percolation. *See supra* at 10-11. In any event, the new arguments are wrong.

a. The Fire District first argues that reading the political subdivisions clause as identifying a distinct category of employer requires also reading the clause in the same provision of the ADEA covering "agent[s] of such a person" as creating a distinct category of employer. Pet. 22. The Fire District contends that this is inconsistent with understanding the agent clause to be an "unremarkable expression of respondeat superior." *Id.* 23 (citation omitted).

But there is no inconsistency in both treating "agent[s] of such a person" as a distinct category of employer and also treating that phrase as an "unremarkable expression of respondeat superior." The agent clause describes only which employers are prohibited from discriminating. It does not dictate who is responsible for paying any judgment. Therefore, courts may allow individuals to "be named as defendants in their representative or official capacities for the purposes of respondeat superior liability," while still "reject[ing] the notion of individual liability under the ADEA." *Leykis v. NYP Holdings, Inc.*, 899 F. Supp. 986, 991 (E.D.N.Y. 1995); *see also Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583,

587 (9th Cir. 1993) (observing that courts holding that individuals may be sued "actually have held individuals liable only in their *official* capacities and not in their individual capacities").

By contrast, the Fire District's reading of Section 630(b)(1) fails to preserve the agent clause as merely importing respondeat superior liability. A premise of the Fire District's argument is that the political subdivision clause and the agent clause must be read symmetrically. So if, as the Fire District contends, the numerosity requirement applied to the political subdivisions clause, then it would also have to apply to the agent clause. The Fire District's reading would therefore impose an independent and additional requirement to prove liability for the acts of an agent; respondeat superior would not necessarily apply.

b. In the Ninth Circuit, "[t]he parties agree[d]" "that the term 'person' does not include a political subdivision of a State." Pet. App. 5a. But the Fire District now makes an about-face. It argues political subdivisions are covered "employers" because they are implicitly included within the definition of "person" in Section 630(a), which in turn includes the catch-all "any organized groups of persons." Pet. 26. That being so, the Fire District continues, the Ninth Circuit's reading of Section 630(b)(2) as "separately defin[ing] *all* political subdivisions as employers" is improperly redundant. Pet. 25.

But the "organized groups of persons" catch-all does not encompass political subdivisions. "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222,

228 (1957) (internal quotation marks and citations omitted); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[T]he specific governs the general 'particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme].'" (second alteration in original) (quoting *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam))). And here, Section 630(b)(2) specifically—indeed, explicitly—covers political subdivisions as "employers." It therefore governs the ADEA's coverage of political subdivisions.

c. The Fire District's last textual argument posits that Judge O'Scannlain's opinion for the Ninth Circuit was insensitive to federalism. According to the Fire District, the Ninth Circuit impermissibly construed Section 630(b) to alter the "balance between federal and State powers" without a "clear statement" of Congress's intent to intrude on state interests. Pet. 30-31.

The clear statement rule, however, can come into play only when necessary "to resolve ambiguity in a federal statute." *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014). Because Section 630(b) is unambiguous, the rule cannot apply.

At any rate, any federalism interest here is negligible at best. A clear statement is required only when federal law implicates "a decision of the most fundamental sort for a sovereign entity." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Such is not the case here. The Fire District does not contend that the Ninth Circuit's holding affects a state's ability to regulate its own

employees. Rather, the Fire District contends only that the Ninth Circuit's holding displaces state authority over local political subdivisions. Pet. 31. But as this Court has explained, no clear statement rule applies to federal laws restricting "a State's authority to set the conditions upon which its political subdivisions are subject to suit." *Jinks v. Richland County*, 538 U.S. 456, 466-67 (2003).

2. *Legislative history.* Because Section 630(b) is unambiguous, legislative history should not be introduced to "muddy [the] clear statutory language," *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011). In any case, the legislative history does not support the Fire District's reading of the statute.

a. Relying on statements from a single senator, the Fire District suggests it would contravene the legislative history of the ADEA to treat public and private employers differently. Pet. 32. But all that senator said was that the ADEA's 1974 amendment would entitle public employees to the "same protections against arbitrary employment" as private employees. 120 Cong. Rec. 8768 (1974) (statement of Sen. Bentsen). The senator's statements simply explain that the ADEA amendment would protect public employees; they say nothing specifically about which public employers would be covered.

On that issue of coverage, the legislative history supports the Ninth Circuit's decision. The United States Senate Special Committee on Aging "urged that the law be extended, at the earliest possible date, to include (1) Federal, State, and local governmental employees, and (2) employers with 20 or more employees." S. Special Comm. on Aging, 93d Cong., *Improving the Age Discrimination Law* 18

(Comm. Print 1973). The fact that this report separated these two categories demonstrates that Congress did not intend the numerosity requirement to apply to public employers.

Contrary to the Fire District's suggestion (Pet. 32-33), there is nothing "puzzling" about covering all public employers while covering private employers only when they have twenty or more employees. Many state laws barring age discrimination cover all political subdivisions while exempting small private employers from their reach. *See supra* at 11-12 (collecting citations). As the Ninth Circuit observed, the 1974 Congress, like these states, may have intended public employers to serve as models of nondiscrimination. *See* Pet. App. 16a n.10. Alternatively, Congress may have thought that government agencies—no matter their size—can better bear the costs of lawsuits than small businesses. *See id.*

b. Notwithstanding the textual differences between the ADEA and Title VII, the Fire District maintains that the ADEA should not cover more political subdivisions than Title VII, while also covering fewer private employers. Pet. 34.

But any purported disjuncture between the ADEA and Title VII cannot justify judicially amending the ADEA to apply its numerosity requirement to political subdivisions. "[T]his Court does not revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014).

Moreover, the Fire District's assumption that Congress could not have intended the ADEA to be

broader than Title VII is simply mistaken. For example, the ADEA allows "much broader" relief than Title VII. *House v. Cannon Mills Co.*, 713 F. Supp. 159, 160 (M.D.N.C. 1988); *compare* 29 U.S.C. § 626(b) (ADEA), *with* 42 U.S.C. § 2000e-5(g) (Title VII). True, the ADEA's coverage of *private* employers is narrower than Title VII's. *See* Pet. 34. But that just reinforces that the two statutes plainly differ in a variety of ways—and that each statute's text should control on its own terms. *See supra* at 7-8, 16.

IV. This case does not present an appropriate vehicle for the Court to decide the question the Fire District presents.

Even if the numerosity issue the Fire District raises were otherwise worthy of this Court's attention, this case is a poor vehicle for addressing it.

1. The interlocutory posture here "alone furnishe[s] sufficient ground for denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). That practice promotes judicial efficiency. If a judgment is entered against the party that is seeking interlocutory review, it can present all of its arguments to the Court in a single petition. *Id.*; *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. Regardless of whether the numerosity requirement applies to the Fire District, the Fire District was a covered "employer" under the ADEA because it had more than twenty employees.

When counting "employees" for purposes of numerosity requirements in antidiscrimination statutes, courts "look first and primarily to whether the individual in question appears on the employer's payroll." *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 211 (1997). Courts also apply "traditional principles of agency law" to confirm "the existence of an employment relationship." *Id.* When conducting this agency inquiry, "no one factor [is] decisive." *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 451 (2003) (citation omitted).

In concluding that the Fire District had at most "19 qualifying employees," Pet. App. 26a, the district court improperly limited *Walters* and ignored *Clackamas*. Although more than twenty firefighters were listed on the Fire District's payroll, the district court stressed that some firefighters listed on the payroll here "did not perform work and receive pay from the employer during the pertinent time frame." *Id.* 26a-27a, 30a. But here, as in *Walters*, traditional agency principles confirm that the individuals in dispute were employees. Those firefighters were under the "control" of the Fire District because, as petitioner has acknowledged, they were "on-call to work when a fulltime firefighter [wa]s unavailable or the Fire District [wa]s short-staffed." Appellee's C.A. Answering Br. 21; *see Clackamas*, 538 U.S. at 448 (describing "control" as the "principal guidepost" of traditional agency law analysis).

Additionally, the district court erred by not counting volunteer firefighters as employees on the ground that they did not receive "substantial benefits." Pet. App. 37a. At least two of those firefighters received pension benefits, were entitled to workers' compensation, and received training and

experience that could lead to full-time employment. *Id.* 36a-37a. At any rate, under *Clackamas*'s multifactor test, individuals need not receive substantial benefits to count as "employees." *See Clackamas*, 538 U.S. at 445 n.5, 449; *see also Fichman v. Media Ctr.*, 512 F.3d 1157, 1160 (9th Cir. 2008) (applying *Clackamas* to the ADEA). And other circumstances here indicate that the volunteer firefighters had an employment relationship with the Fire District. *See Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 354-56 (6th Cir. 2011) (holding that defendant fire district was not entitled to summary judgment against volunteer firefighters on Title VII numerosity grounds).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondents concede that the ADEA now means different things in different circuits. In the Sixth, Seventh, Eighth, and Tenth Circuits, the statute covers both private employers and State political subdivisions only if they have twenty or more employees. In the Ninth Circuit, however, the statute sweeps far more broadly, covering State political subdivisions of *any* size. Only this Court can resolve that real and consequential fissure in federal age discrimination law.

Respondents offer no reason for the Court to stay its hand. Much of their brief contends that the Ninth Circuit's side of the split should prevail on the merits. Those arguments are unconvincing on their own terms, but in any event they confirm that the division of authority is clearly defined and warrants certiorari. Respondents' efforts to minimize the significance of the circuit split are similarly unpersuasive. State political subdivisions now face dramatically different ADEA liability based solely on geographic happenstance. That is an important issue worthy of this Court's immediate review.

ARGUMENT

I. The Circuit Split Regarding § 630(b)'s Meaning Is Clear And Firmly Entrenched.

The division of authority on § 630(b)'s meaning is acknowledged and irreconcilable. The Ninth Circuit recognized that "four other circuits"—the Sixth, Seventh, Eighth, and Tenth—"all have declared § 630(b)

to be ambiguous" regarding coverage of State political subdivisions. Pet. App. 11a. Those four circuits unanimously construe the statute to exempt State political subdivisions with fewer than twenty employees. *See Cink v. Grant Cty.*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015); *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *EEOC v. Monclova Twp.*, 920 F.2d 360, 362-63 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270-73 (7th Cir. 1986). The Ninth Circuit disagreed. Rejecting the reasoning of its sister circuits as "underwhelming," it held instead that the ADEA is unambiguous—and covers political subdivisions of *any* size. Pet. App. 13a-15a. The circuit split could not be clearer.

Nonetheless, respondents insist that the division of authority is "overblown." Opp. 6-7. Their arguments are meritless. And several actually bolster the case for certiorari.

A. Respondents first belittle the circuit split because the Sixth, Seventh, Eighth, and Tenth Circuits purportedly used an outmoded method of statutory interpretation that "cannot be reconciled" with this Court's more recent jurisprudence. Opp. 7-10. According to respondents, those circuits arrived at an erroneous interpretation by focusing insufficiently on § 630's text and improperly analogizing to Title VII. *See id.* The Ninth Circuit, in contrast, employed what respondents consider the correct statutory "approach." *Id.* at 9.

As a critique of the circuit split, this argument backfires. Respondents suggest only that one side of a

well-defined disagreement among the circuits is erroneous, while the other side is correct. That is a feature, not a bug, of disputes that warrant this Court's attention. And it confirms that the split regarding § 630(b)'s meaning is ripe for certiorari—however the merits ultimately play out. (As a separate matter, respondents' methodological critique is unpersuasive: The Sixth, Seventh, Eighth, and Tenth Circuits looked "beyond" the "plain language" of § 630 only after determining it was "ambiguous," as this Court requires. *Kelly*, 801 F.2d at 270; *see Monclova*, 920 F.2d at 362.)

B. Next, respondents summarily assert—without authority—that the Tenth Circuit's recent decision in *Cink* "cannot be part of any split" because it is unpublished. Opp. 7. But this Court does not simply turn a blind eye to unpublished decisions. To the contrary: "[T]he Court grants certiorari to review unpublished and summary decisions with some frequency." Stephen M. Shapiro et al., *Supreme Court Practice* 264 (10th ed. 2013) (citing examples). Even if unpublished, *Cink* is part of the division of authority over § 630(b)'s meaning. *Id.* (unpublished decisions can "signal[] a persistent conflict" among circuits). And it directly disproves respondents' assertion that "[n]o court today would analyze" § 630(b) the way *Kelly* did. Opp. 10.

Moreover, even putting *Cink* aside, the circuit split remains real and deep. In applying the ADEA to small State political subdivisions, the Ninth Circuit squarely rejected the longstanding consensus of the Sixth, Seventh, and Eighth Circuits. That disagreement over the statute's scope warrants this Court's

review, even apart from the fact that the Tenth Circuit has now endorsed the majority position.

C. In a final bid to undermine the circuit split, respondents suggest that further percolation is warranted because "*no* court has yet considered, much less adopted," the petition's arguments regarding § 630(b)'s meaning. Opp. 7. In particular, respondents claim that petitioner "presented none of these arguments to the Ninth Circuit." *Id.* at 10. That is wrong. The petition argues that "[t]wo features of § 630" undercut the Ninth Circuit's expansive construction: the "agent" clause in the statute's second sentence, and the definition of "person" in the first sentence. Pet. 22, 25. The courts of appeals—including the Ninth Circuit—have had a full opportunity to consider the interpretive significance of both features.

First, the "agent" clause provides that an "employer" under the ADEA includes "any agent" of a "person" covered by § 630(b)'s first sentence. Every court of appeals to consider the issue—including the Ninth Circuit in a prior decision—has construed the "agent" clause merely to codify respondeat superior liability for "persons," without rendering agents independently liable under the statute. Pet. 23. That directly contradicts the Ninth Circuit's flawed interpretation of § 630(b) in this case, which requires the "agent" clause—along with the neighboring "political subdivisions" clause—to create a "distinct categor[y]" of liable employers. *Id.* at 22-25.

Petitioner raised this very issue below. Its answering brief explained that the "agent" clause merely "incorporate[s] respondeat superior liability

into the statute." Ans. Br. at 10, *Guido v. Mount Lemmon Fire Dist.*, No. 15-15030 (9th Cir. July 1, 2015), ECF No. 18. On that basis, the brief concluded that the "agent" clause is "related to the first sentence" of § 630(b), including its "twenty-employee threshold." *Id.* at 9. The brief then argued that the neighboring "political subdivisions" clause must be read in parallel with the "agent" clause, and therefore must also relate to the statute's first sentence. Any other approach, the brief explained, would be "illogical." *Id.* The Ninth Circuit therefore had ample opportunity to consider how the "agent" clause's limited scope shapes the meaning of § 630(b) as a whole.

The same is true for the term "person" in § 630(b)'s first sentence. A person is defined to include a broad range of entities, including "any organized groups of persons." 29 U.S.C. § 630(a). As the petition explains, that sweeping catch-all is best read to encompass State political subdivisions. Pet. 26-27. Accordingly, § 630(b)'s first sentence defines political subdivisions as employers if they (like other "persons") have twenty or more employees. It would thus be strangely redundant for § 630(b)'s *second* sentence to separately cover *all* political subdivisions—the Ninth Circuit's interpretation. *Id.* at 25-27. But it would be entirely coherent for that second sentence merely to *clarify* that political subdivisions are no longer categorically exempt from statutory coverage, as they were in earlier versions of the ADEA. *Id.*

Far from raising a novel argument, petitioner's reading of "person" is fundamental to the decisions of the Sixth, Seventh, Eighth, and Tenth Circuits. Those courts have concluded that the mention of political

subdivisions in § 630(b)'s second sentence does not offer "a separate definition of employer," but merely "make[s] it clear that states and their political subdivisions are to be included in the definition of 'employer'" offered in preceding clauses—a definition that centers on "persons." *Kelly*, 801 F.2d at 271. As the Tenth Circuit confirmed in *Cink*, that means the term "person" has been "specified, or judicially interpreted, to include political subdivisions." 635 F. App'x at 472 n.4.

The Ninth Circuit considered this issue too. It simply disagreed with its sister courts of appeals, holding instead that "political subdivisions are not defined as persons in § 630(a), thus explaining why they have to be included as separate definitions of employers in § 630(b)." Pet. App. 7a n.3. As respondents note, the Ninth Circuit separately suggested that the parties "agree[d] ... that the term 'person' does not include a political subdivision of a State." Pet. App. 5a; *see* Opp. 18. But that was incorrect: Far from conceding the point, petitioner urged the Ninth Circuit to adopt the competing reasoning of *Cink* and related decisions. *See* Suppl. Br., *Guido v. Mount Lemmon Fire Dist.*, No. 15-15030 (9th Cir. Dec. 5, 2016), ECF No. 34.

In sum, respondents' attacks on the circuit split are unavailing. The division of authority regarding § 630(b)'s meaning is acknowledged and entrenched. And the petition raises arguments previously presented to, and considered by, the courts of appeals—including in this case.

II. The Ninth Circuit's Interpretation Of The ADEA Is Incorrect.

Respondents fare no better on the merits. They fail to reconcile the Ninth Circuit's unprecedented interpretation of § 630(b) with either the "agent" clause or the definition of "person"—the two textual features that the decision below seriously misapprehends. Pet. 22-30.

A. To begin with, respondents do not dispute that the "agent" clause merely codifies respondeat superior liability for any "person" covered by § 630(b)'s first sentence, without rendering agents independently liable. Opp. 17. Respondents also do not dispute that the Ninth Circuit's interpretation requires the "agent" clause to create a "distinct category of employer" liable under the statute. *Id.* That is a critical flaw in the court's analysis. The ADEA provides that every "employer" who violates the statute's prohibitions "shall be liable to the employee or employees affected" for backpay, damages, and equitable relief. Pet. 23 (quoting 29 U.S.C. § 216(b)). The "agent" clause does not define such an "employer." It merely provides an alternative mechanism for imposing liability on the "persons" already covered by § 630(b)'s first sentence. Pet. 23-25.

Respondents offer no explanation for this error in the Ninth Circuit's reasoning. They simply note that the "agent" clause permits suits against agents only in their "representative or official capacities." Opp. 17. But that is precisely the problem. Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is

an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). "Thus, ... a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Id.* at 166. That means there is no new type of liable employer under § 630(b)'s "agent" clause—directly contrary to the Ninth Circuit's reading.[1]

B. Separately, respondents agree that the statutory definition of "person" encompasses "any organized groups of persons"—an ambiguously circular phrase that uses the very word ("person") it purports to define. Pet. 26. Respondents also never dispute that prior versions of § 630(b) used "person" to encompass State political subdivisions. Pet. 27. In light of those textual considerations, "person" must be read to include political subdivisions. *Id.* Thus, contrary to the Ninth Circuit's construction, § 630(b)'s first sentence—which provides that certain "persons" qualify as employers—already defines the scope of liability for State political subdivisions. Pet. 25-27.

Respondents attempt to contest this conclusion by distorting the interpretive canon that "[t]he specific governs the general." Opp. 19. They first note that political subdivisions are "specifically" mentioned in § 630(b)'s second sentence. On that basis alone, respondents contend that political subdivisions cannot be "encompassed" by the more general term "person"

---

[1] Respondents mistakenly suggest that petitioner's reading of § 630(b) requires agents to have twenty or more employees. Opp. 18. In fact, petitioner reads the "agent" clause to cover agents of any size serving a "person," including a State political subdivision, with twenty or more employees.

in the statute's first sentence. But specific clauses govern general ones only when giving full effect to both would create a "contradiction" or "superfluity." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). As the petition explains, there is no such tension here. Section 630(b)'s first sentence provides that any "person" with twenty or more employees is an employer under the ADEA. Section 630(b)'s second sentence then clarifies that State political subdivisions are subject to that type of liability—a critical change from the original statute. Pet. 27. The provisions operate as an integrated whole, without contradiction or superfluity.

Respondents also reiterate the Ninth Circuit's mistaken view that because Congress used different language when it amended Title VII in 1972 and the ADEA in 1974, only one of those statutes—Title VII—can be read to impose an employee threshold on State political subdivisions. Opp. 16. As the petition explains, there is no such interpretive rule. The statutes were differently worded to begin with; thus, when Congress amended them, it was not required to harmonize their language in order to accomplish similar legislative ends. Pet. 34-36.

By overlooking these critical features of § 630(b)'s text, the Ninth Circuit failed to interpret the statute's words "in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016); *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). When the ADEA is instead construed holistically, as this Court requires, it covers State political subdivisions only if they have twenty or more employees.

III. The Question Presented Is Important.

Respondents maintain that even if the circuit split is clear—and even if the Ninth Circuit is wrong—the dispute over § 630(b)'s meaning is not "significant enough to merit review." Opp. 11. Respondents do not dispute that the split has created competing federal age discrimination regimes: one that permits States to judge how best to regulate their small political subdivisions, and another that displaces those sensitive State judgments in favor of a one-size-fits-all federal policy. Pet. 19-20. In an effort to minimize that fundamental rift, respondents suggest that there is no practical difference between the two regimes. Again, their arguments are unpersuasive.

A. Respondents first contend that inter-circuit differences in the ADEA's scope lack "any real import" because state age discrimination laws "typically forbid all political subdivisions—regardless of size—from discriminating against employees on the basis of age." Opp. 11. Thus, in respondents' view, small political subdivisions already face the type of liability that the ADEA would impose—and the Ninth Circuit's expansion of ADEA coverage will have negligible practical effect.

In fact, however, the Ninth Circuit's expansion of the ADEA has imposed substantial new burdens on small political subdivisions in *the majority* of affected States. Two out of nine States in the Ninth Circuit exempt small political subdivisions from their age discrimination laws. *See* Ariz.Rev.Stat. Ann. §§ 41-1461(6), 41-1463(B); Nev.Rev.Stat. §§ 613.310,

613.330(1). In those States, small political subdivisions are now subject to age discrimination liability for the first time. Further, at least three additional States prohibit or significantly limit non-compensatory damages for age discrimination. *See* Cal. Gov't Code § 818 (exempting public entities from punitive damages); *Dailey v. N. Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) (en banc) (prohibiting punitive damages under state employment discrimination statute); Idaho Code § 67-5908(3)(e) (capping punitive damages at $1,000 per willful violation). In those States, expanded ADEA coverage adds a new potential liability: non-compensatory "liquidated damages" as high as the backpay award in cases of willful discrimination. 29 U.S.C. § 626(b); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-26 (1985).

B. Perhaps recognizing as much, respondents suggest that the additional costs imposed by ADEA liability will have no meaningful impact on small State political subdivisions because they "participate in insurance pools." Opp. 13. But insurance does not make new legal expenses disappear; it simply packages them as premiums. A spike in such premiums would impose exactly the type of financial burden that might compel small political subdivisions with limited budgets to cut services. Indeed, the very publication cited by respondents warns that as "[b]udgets continue to tighten," public entities "are asking for premium reductions"—even as a "[l]itigious environment" increases the "cost of handling claims." Karen Nixon, *Public Entity Pooling—Built to Last* 9 (Dec. 16, 2011), https://tinyurl.com/8ahkpl8.

C. Finally, respondents suggest that the ADEA's employee threshold will "often be immaterial"—and thus seldom litigated—because plaintiffs can usually hold "related" or "integrated" entities liable for the employment practices of small State political subdivisions. Opp. 14. That is unfounded conjecture. Special districts like Mount Lemmon operate with independent budgets under the governance of a dedicated board. Pet. 6-7; Ariz.Rev.Stat. Ann. § 48-803. No larger or coordinate entity plays a significant role in their administration. Not surprisingly, respondents cite no case in which another entity has been held liable for a special district's conduct—even though there were *38,266* special districts nationwide as of 2012. Pet. 7.

Respondents also suggest that small political subdivisions are too leanly staffed to "generate many ADEA claims." Opp. 14. But with *thousands* of those entities in the Ninth Circuit alone, Pet. 20, ADEA claims are now sure to recur.

IV. This Case Is An Ideal Vehicle For Review.

This case presents an excellent vehicle to decide the meaning of § 630(b). The issue was comprehensively briefed before the Ninth Circuit, including by the EEOC as amicus curiae. Pet. 36-37. And the court's unprecedented interpretation of § 630(b)—which expressly split from the other courts of appeals—was the sole basis for its decision. Pet. 37.

Respondents argue that this Court's initial denial of certiorari in *Virginia Military Institute v. United*

States counsels against review. Opp. 22. There, however, this Court sensibly declined to consider an issue—the appropriate remedy for VMI's unconstitutional admissions policy—that the lower courts had not yet decided. *See Va. Military Inst. v. United States*, 508 U.S. 946 (1993). Here, in contrast, the Ninth Circuit has conclusively resolved the meaning of § 630(b), and there will be no further proceedings on the issue. The question presented is thus ripe for this Court's review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

The Age Discrimination in Employment Act (ADEA) defines certain private and public entities as "employers" and prohibits them from discriminating against employees on the basis of age. The Act applies to private entities only if they are "engaged in an industry affecting commerce" and "ha[ve] twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b).

The question presented is:

Under the ADEA, does the same 20-employee minimum that applies to private employers also apply to state agencies and political subdivisions of a State?

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OPINIONS AND ORDERS BELOW

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JURISDICTION

The Court of Appeals entered judgment on June 19, 2017. Pet. App. 1a. On August 30, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to October 18, 2017. The certiorari petition was filed on October 18, 2017, and granted on February 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definitions of "person" and "employer" under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 630(a)-(b). Section 630 is reproduced in full at pages SA1-5 of the Statutory Appendix to this brief. The text of that section as originally enacted in 1967, Pub. L. No. 90-202, § 11, 81 Stat. 602, 605-07, is reproduced at pages SA6-9. The parallel section of Title VII, 42 U.S.C. § 2000e, which bears on the question presented here, is reproduced in full at pages SA10-14. Its text as originally enacted in 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253-55, is reproduced at pages SA 15-18.

INTRODUCTION

This case is about the only right way to read a statute: Beginning to end.

Petitioner Mount Lemmon Fire District is a small "special district" in Arizona with 11 full-time employees. Struggling with a budget shortfall, it was forced to lay off personnel. Respondents John Guido and Dennis Rankin claim the Fire District picked them because of their age. They sued under the federal Age Discrimination in Employment Act, or "ADEA."

At that point, every circuit to have confronted this situation had found that the ADEA does not cover political subdivisions as small as the Fire District. They had all held that § 630(b)—which defines the "employers" the ADEA covers—excludes any entity, public or private, with fewer than 20 employees. That conclusion flows naturally when one reads the statute in order.

The first sentence reads:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ....

This sentence, the circuits had unanimously held, is a baseline definition of the term "employer." The word "person" is defined very broadly in § 630(a) to include

"any organized groups of persons," easily encompassing local political subdivisions. So right off the bat, a political subdivision is covered, but only if it has at least 20 employees (and "affect[s] commerce").

The second sentence then clarifies what the first includes:

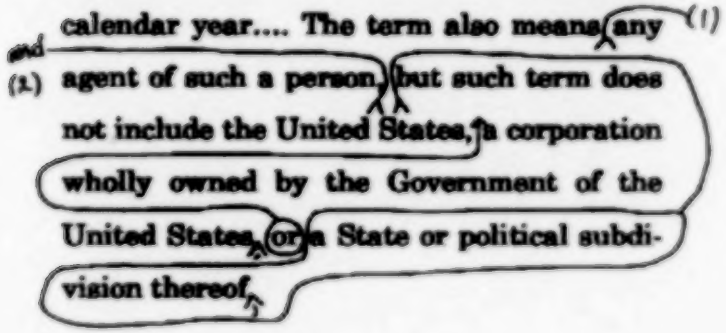
> The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Again, read it from the beginning—from the clause about "any agent." Every single regional circuit has found that this language (or language like it in other statutes) clarifies that traditional agency principles and respondeat superior are incorporated in the term "employer." True, one could read the phrase "also means" to create an entirely new category of employer—"any agent"—and subject all supervisors and human resources administrators to personal liability as employers. But imposing personal liability on employees who make or implement hiring and firing decisions would be a startling departure from age-old practice. So every circuit concludes that, in context, the term "also means" is a transitional phrase that signifies amplification or clarification; it refines the contours of what the first sentence already covers.

The phrase "also means" performs the same function for the next clause. It is a transitional phrase. It amplifies the first sentence, clarifying that States and their political subdivisions are included in, or incorporated into, the first sentence as employers (within the limits of the first sentence), while the federal government is not.

Is it the most elegant statute Congress ever drafted? It won't win any awards. But in fairness to Congress, it was not drafting this way from scratch. In 1974, it amended a preexisting definition to encompass certain governmental entities, essentially as follows:

> **The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means (1) any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.**



So Congress did not pull the words "also means" from the dictionary and attach them to "a State or political

subdivision" to create a new category of employer. The words were already in the statute and already serving a transitional, clarifying function regarding agency liability, rather than an additive function that would add new employer categories.

The only way the Ninth Circuit could reach its outlier position was to ignore most of § 630(b)'s text and context. It did not start from the first sentence or from the beginning of the statutory history. It skipped right through to the single word "also," and read that word to mean "in addition." It thus found that § 630(b)'s second sentence adds additional, distinct categories of employer, including "a State or political subdivision." And it found that this newly created category is not subject to the first sentence's limitations, including the 20-employee minimum (and, presumably, the "affecting commerce" limitation).

This is a classic case of a lower court improperly construing "[s]tatutory language ... in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Predictably, that approach yields inexplicable statutory anomalies. For example, it singles out public employers for burdens that it does not impose on private ones of comparable size—despite Congress's stated intention to treat public employers the same as private ones. Meanwhile, it actually disadvantages public employees by eliminating respondeat superior liability. It inexplicably and unnecessarily creates constitutional problems by subjecting public employers to liability even when they have no effect on commerce. And it puts the ADEA in tension with comparable antidiscrimination laws. The Ninth Circuit never explained why Congress would exempt small employers

from discrimination suits based on race, sex, nationality, and disability, but not those based on age.

The result is to subject tens of thousands of state and local entities to burdensome and costly federal litigation that they are ill-equipped to absorb—jeopardizing their ability to deliver critical services.

This Court should start at the beginning, and end with the only reading that makes sense: The Fire District is a "person" but not an ADEA-covered "employer" because § 630(b) defines that term to exclude a "person" with fewer than 20 employees.

The Ninth Circuit should be reversed.

STATEMENT OF THE CASE

Congress Enacts The ADEA But Excludes Governmental Entities

The ADEA prohibits employers from taking adverse actions because of an employee's age. *See* 29 U.S.C. § 623. A covered employer is liable under the statute for backpay, damages, and prospective relief like reinstatement. *See id.* §§ 216(b), 626(b). As originally enacted in 1967, the ADEA covered only private-sector employers. Congress accomplished that with the definitions of two statutory terms: "person" and "employer."

The original ADEA defined "person" expansively. The term meant (and still means) "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons."

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11(a), 81 Stat. 602, 605 (codified at 29 U.S.C. § 630(b) (1967)).

The statute defined "employer," in turn, by incorporating and then qualifying the term "person":

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ....[1] The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.

Id. § 11(b), 81 Stat. 605. The definition of "employer" thus narrowed the broadly defined term "person" by excluding three types of entities: those that (1) are not "engaged in an industry affecting commerce"; (2) have fewer than "twenty-five ... employees"; or (3) are governmental entities.

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[1] For clarity, this reproduction of the original statute omits language establishing a transitional period during which a higher employee minimum temporarily applied. That period has expired and has no bearing on this case. *See* Pub. L. No. 90-202, § 11(b), 81 Stat. 605.

Congress Extends The Definition Of "Employer" To States And Their Political Subdivisions

In 1974, Congress amended the ADEA with language that remains in force today. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1)-(2), 88 Stat. 55, 74 (codified at 29 U.S.C. § 630(b)). The revised statute retained the original definition of "person." *See* 29 U.S.C. § 630(a). But it expanded the definition of "employer" as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has ~~twenty-five~~ twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States~~, or a State or political subdivision thereof~~.

Compare id. § 630(b), *with* Pub. L. No. 90-202, § 11(b), 81 Stat. 605. This language narrows the original exclusions based on size and governmental affiliation. It drops the employee minimum from 25 to 20. And where the provision once excluded all governmental entities, it now excludes only the federal government

and federally owned corporations—not state or local entities.[2]

The 1974 amendments made clear that States and their agencies and political subdivisions are no longer categorically excluded from the ADEA's definition of "employer." *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). But the syntax of § 630(b)'s revised second sentence raised a question about the governmental entities newly subject to potential ADEA liability as "employers": Were they, like all private employers, subject to the 20-employee minimum, or had Congress created an entirely new category of potentially liable public employers with no size restriction at all?

The Circuits Unanimously Agree That Smaller Political Subdivisions Are ADEA-Exempt

Until this case, every court of appeals to confront that question—the Sixth, Seventh, Eighth, and Tenth Circuits—reached the same answer: Section 630(b)'s 20-employee threshold applies to state and local governments. *See Cink v. Grant Cty.*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015); *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *EEOC v. Monclova Twp.*, 920 F.2d 360, 362-63 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270-73 (7th Cir. 1986).

The Seventh Circuit's opinion in *Kelly*, the first to address the issue, illustrates the majority approach.

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[2] Federal employers are covered by a separate section of the ADEA. *See* 29 U.S.C. § 633a.

Kelly held that § 630(b)'s second sentence "merely ... make[s] it clear that states and their political subdivisions are to be *included*" in the preceding "definition of 'employer,'" on the same terms as private entities. *Kelly*, 801 F.2d at 270-71, 273; *accord Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362-63. Under that construction, the mention of state and local governmental entities in § 630(b)'s second sentence does not separately define all such entities as a distinct category of employers. Rather, it clarifies that those entities—already included in the expansive term "person"—are no longer categorically excluded from the person-based definition of "employer." Thus, state and local governments are treated the same as private businesses: They are covered by the ADEA only if they affect commerce and have 20 or more employees. *Kelly* grounded that construction in the ADEA's current and prior text, its purposes and legislative history, and its relationship to other federal antidiscrimination law. *See* 801 F.2d at 270-73.

Respondents Bring ADEA Claims Against The Fire District And The District Court Dismisses The Case

Petitioner Mount Lemmon Fire District is one of Arizona's political subdivisions—a special district that provides local fire protection and prevention services. Special districts are generally created by petition of local property owners or officials; some States may require elections. *See, e.g.*, Ariz. Rev. Stat. § 48-261; Colo. Rev. Stat. §§ 32-1-205–32-1-301; Municipal Research and Services Center of Washington, *Special Purpose Districts in Washington State* 19-20 (2003),

available at https://tinyurl.com/y7gxe3bg. Their budgets are often independent, drawn primarily from local property taxes. Ariz. Rev. Stat. § 48-261; *Special Purpose Districts in Washington State*, *supra*, at 28. Each district provides a specific service to the local community. In addition to fire prevention, they provide electricity, irrigation, waste management, water conservation, pest control, or any of dozens of other functions authorized by statute. *See, e.g.*, Ariz. Rev. Stat. §§ 48-301–48-6819; U.S. Census Bureau, *Individual State Descriptions: 2012* (hereinafter "*State Descriptions*") at ix (Sept. 2013), https://tinyurl.com/ybk3q2wh. These entities abound. As of 2012, there were 38,266 special districts nationwide, performing a vast range of functions. U.S. Census Bureau, *Special District Governments by Function and State: 2012* (hereinafter "*Special District Governments*") (Sept. 26, 2013), https://tinyurl.com/y8bdha3h; *State Descriptions*, *supra*, at x. They often have small staffs, drawn from the property owners who fund them.

In 2009, the Fire District confronted a fiscal crisis.[3] Property tax revenues had plummeted. The Fire District's budget shrank accordingly, roughly from $515,000 to $448,000. In trying to make ends meet, the Fire District put a high priority on preserving the jobs of its 11 full-time employees. It did everything it could to avoid layoffs. It ran bake sales. It took on

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[3] The facts in this paragraph are taken from the district court's opinion, Pet. App. 19a-21a, and the parties' submissions to the district court, *see* D. Ct. 69, at 1-3; D. Ct. 69-2, at 2-3, 7; D. Ct. 74-2, at 5; D. Ct. 74-3, at 5. Throughout, we use C.A. to refer to the Ninth Circuit's docket entries, and D. Ct. to refer to the district court's docket entries.

work on behalf of federal authorities. But those efforts fell short. The Fire District had to reduce annual expenses by tens of thousands of dollars, and temporary layoffs were its only choice. So it laid off Respondents John Guido and Dennis Rankin. Both of them had been hired by the Fire District in 2000, when Guido was in his late-thirties and Rankin his mid-forties. At the time of the layoffs, Guido was 46 (about the same age Rankin was when he had been hired) and Rankin was 54. *See* Pet. App. 19a-20a.

Respondents allege that the Fire District laid them off because of their age. The Arizona Civil Rights Act, which applies to a wide swath of the State's political subdivisions, bars discrimination on the basis of age. Ariz. Rev. Stat. §§ 41-1461(6), (10), 1463(B). But it does not apply to political subdivisions that, like the Fire District, have fewer than 15 employees. *Id.* § 41-1461(6). So Respondents instead sued under federal law, invoking the ADEA.

The district court granted summary judgment to the Fire District. Adopting the uniform view of the circuits, the court held that the ADEA applies to local political subdivisions the same way it applies to private employers: only if they have at least 20 employees. Pet. App. 20a-26a. The district court then reviewed the Fire District's employment records and held, as a matter of law, that the fire district had fewer than 20 employees in the relevant period, thereby excluding it from the ADEA's coverage. Pet. App. 26a-37a.

The Ninth Circuit Rejects The Longstanding Consensus

The Ninth Circuit reversed and remanded. It recognized that "four other circuits" had read § 630(b) to apply the 20-employee minimum in the public sector. Pet. App. 11a. But it rejected their unanimous consensus. The court's analysis began and ended with the dictionary definition of one word: The Ninth Circuit noted that "also" is ordinarily defined to mean "in addition," and so concluded that the words "also means ... a State or political subdivision" must be read to *add* all local governmental entities as "employers" under the statute—regardless of size. Pet. App. 7a, 13a-14a. In the court's view, the majority rule was too "underwhelming" to be "deemed reasonable" because it departed from the dictionary meaning of "also." Pet. App. 12a-13a. The Ninth Circuit barely addressed the remaining text of § 630.

SUMMARY OF THE ARGUMENT

I. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). The ADEA's text, context, and statutory history establish that § 630(b)'s 20-employee minimum exempts small political subdivisions.

A. Starting from the beginning, § 630(b)'s first sentence defines the term "employer" expansively to include political subdivisions, but only those with at least 20 employees. That sentence is based on the

broadly defined term "person," which includes "any organized groups of persons," words that certainly embrace political subdivisions like the Fire District. The definition of "person" also lists "corporations" and "associations," underscoring the term's breadth.

Additional statutory context confirms the point. Both § 630(b) and § 630(c) use the term "person" and then explicitly exclude "the United States" and other federal entities. This would be surplusage if the term "person" did not already include public entities. The conclusion becomes even clearer in light of § 630(b)'s statutory history. As initially enacted, § 630(b)'s first sentence defined the term "employer" based on the term "person," and its second sentence then excluded *all* governmental entities. Again, this would have been unnecessary unless the term "person" included such entities to begin with.

B. Because political subdivisions fall within the first sentence of § 630(b), they are subject to that sentence's limitations, unless something in the second sentence overrides them. The Ninth Circuit read the words "also means" to do so. Ignoring surrounding context, it construed those words to mean "in addition" and thus to create distinct categories of employers, including state agencies and political subdivisions of any size. But that reading is inconsistent with the rest of the statute. In context, "also means" clarifies the first sentence's definition of "employer"; it does not create new categories of employers.

To treat "also means" as an expansion would be unfathomable when considered alongside the words

"any agent of such a person"—it would define agents as a separate category of employer subject to personal liability. Every court of appeals to construe the ADEA's agent clause has rejected that reading, finding instead that "also means" operates as a clarification ("includes"), not as an expansion ("in addition"). The words "also means" must be given the same meaning when applied to the governmental clause at issue in this case: The phrase clarifies which governmental entities are included in the definition of "employer" in § 630(b)'s first sentence, without separately delineating additional categories of employers.

C. Two canons of construction resolve any lingering ambiguity in favor of applying the minimum-employee requirement. First, courts may not read a statute to override the "usual constitutional balance of federal and state powers" absent a clear statement from Congress. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The Ninth Circuit improperly altered that balance in ways Congress did not clearly intend—both by restricting how small state agencies may hire and fire their employees, and by overriding state judgments exempting small political subdivisions from the burdens of age-discrimination litigation. Second, the Ninth Circuit's reading would mean that the first sentence's "affecting commerce" requirement would not apply to small state agencies and political subdivisions. The majority rule avoids this constitutional problem.

II. Applying the ADEA's 20-employee minimum to political subdivisions also accords with Congress's stated goals in amending the statute. It places public and private employers on an equal footing, parity that

Congress expressly sought to achieve. And it accomplishes Congress's goal of harmonizing the ADEA with Title VII of the Civil Rights Act—the inspiration for the ADEA amendments that expanded coverage to include States and political subdivisions.

The Ninth Circuit's reading does just the opposite. It creates inexplicable disparities in the ADEA's treatment of public and private employers: State and local governments, unlike private businesses, would be covered regardless of their size or effect on commerce, yet *exempt* from respondeat superior liability. These anomalies make no sense even on their own terms. But they are particularly untenable in light of Title VII. That statute—along with the Americans with Disabilities Act (ADA)—applies the same employee minimum, commerce requirement, and respondeat superior principles to public and private entities alike. Under the Ninth Circuit's reading, therefore, the ADEA would bear no resemblance to its sister statutes in the public sector—even as it closely tracks them in the private sector.

These disparities are inexplicable, and together they yield a haphazard and illogical ADEA. The Ninth Circuit dismissed these problems because Congress amended Title VII in 1972 "us[ing] different language than it used in the 1974 ADEA Amendment." Pet. App. 15a. But the two statutes did not start in the same place; Title VII originally defined person more narrowly than the ADEA. So it is only natural that they took a different route to get to the eventual same answer.

III. The Ninth Circuit's reading of § 630 would have devastating effects on small state agencies and political subdivisions. Employee minimums serve important and salutary purposes, like "spar[ing] very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999). The 38,000 special districts nationwide are especially vulnerable, because they are often understaffed and underfunded. Congress could not have intended to threaten the survival of small political subdivisions.

The decision below should be reversed.

ARGUMENT

I. The ADEA's Text, Context, And Statutory History Establish That § 630(b)'s 20-Employee Minimum Exempts Small Political Subdivisions.

The Ninth Circuit's outlier reading of § 630(b) is "plausible in the abstract," *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016), but impossible in context. The Ninth Circuit ignored the forest for a tree—the single word "also." It assigned that word one possible meaning without regard for whether that meaning jives with the rest of the statute. It doesn't. The Ninth Circuit's reading must be rejected because it is "ultimately inconsistent with both the text and context of the statute as a whole." *Id.*

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.*; *see Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). The reason is that "[i]n law as in life, ... the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion); *see id.* at 1092 (Kagan, J., dissenting) ("sometimes ... the dictionary definition of a disputed term cannot control").

It is true that "also" can mean "in addition," as the Ninth Circuit found. But that is not its only meaning. In fact, the Oxford English Dictionary does not even list that meaning first. Its first (non-obsolete) definition is: "Expressing amplification." It recites the definition, "as a further point ... tending in the same direction," before it ever gets to "in addition." Oxford English Dictionary (3d ed. 2011), https://tinyurl.com/also-definition. That is how it is used here: "Also" signifies amplification or transition, along the lines of "moreover." Congress used it to signify further clarification, rather than addition. In this context, "also means" signifies "includes" or "incorporates."

As every other circuit has concluded, this is the only meaning that makes sense when the ADEA is read as a whole—reading it from the beginning of the statute and not the middle, and understanding it in light of the provision's evolution. Under the majority reading, the first sentence presents a baseline definition of "employer" that includes political subdivisions, but only those with at least 20 employees. § I.A. The

second sentence does not override that limitation. Rather, it builds on that baseline definition of "employer," clarifying what that definition includes. § I.B. If the text, context, and statutory history leave any ambiguity, two canons of statutory construction decisively resolve the ambiguity in favor of retaining the employee minimum. § I.C.

A. Section 630(b)'s first sentence defines "employer" expansively to include political subdivisions, but only those with at least 20 employees.

We start at the beginning, a very good place to start. Section 630(b)'s first sentence limits the term "employer" to a subset of all "persons":

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees ....

So the first step in construing this statute is to answer a question the Ninth Circuit declined to address: How does this sentence treat political subdivisions? The answer is that a political subdivision is a "person," and therefore is an ADEA-covered "employer" if, but only if, it (1) affects commerce and (2) has more than 20 employees. The statutory history confirms that this is what Congress intended.

1. Statutory text and context establish that the word "person" includes political subdivisions.

a. When Congress uses the word "person," it typically intends a broad construction. Even where Congress does not define the term, this Court has interpreted it to include local political subdivisions. *See Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 122, 125 (2003) (reading "person" that way under the False Claims Act); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (same for 42 U.S.C. § 1983). This Court has maintained that understanding across a variety of statutory definitions. *See, e.g., Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 56 (1982) (antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities"); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 394-97 (1978) (Sherman Act and Clayton Act); *City of Lincoln v. Ricketts*, 297 U.S. 373, 375 (1936) (Bankruptcy Act); *see also Clinton v. City of New York*, 524 U.S. 417, 428 (1998) (finding that "in the context of the entire section [of a statute], Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person,'" and thus apply to New York City).

In the ADEA, Congress adopted an explicit—and broadly inclusive—definition of "person." Section 630(a) defines "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. § 630(a). The culmination of this definition—"any organized

groups of persons"—most certainly embraces political subdivisions. As this Court has noted several times, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *E.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). "Organized" means "having a formal organization to coordinate and carry out joint activities." Webster's Third New International Dictionary 1590 (1993). And "group" means "a number of individuals bound together by a community of interest, purpose, or function." *Id.* at 1004.

Putting it all together, the words "*any* organized groups of persons" embrace political subdivisions. The Fire District, for example, is a "number of individuals" (its Board of Directors, EMTs, firefighters, and the property owners who fund them) with a "formal organization to coordinate and carry out activities" related to fire protection and prevention. There is "no indication whatever that Congress intended to limit the phrase" to private entities. *Ali*, 552 U.S. at 219-20 (internal quotation marks omitted). To the contrary, Congress's use of a catchall communicates that the term "person" should not be interpreted in a technical or limited fashion. The "catchall[]" in the ADEA's already "quite general" definition of "person" thus serves to "ensure beyond question" that the term broadly embraces political subdivisions. *Yates*, 135 S. Ct. at 1089 (Alito, J., concurring).

The mention of "corporations" and "associations" earlier in § 630(a) confirms the breadth of "person." This Court has repeatedly construed those terms to

encompass local governmental entities.[4] By using the same terms to exemplify the scope of "person" under the ADEA, Congress reinforced that public entities, no less than private businesses, qualify as "organized groups of persons."

b. Additional statutory context confirms that the definition of "person" is not limited to private entities. The second sentence of § 630(b) states that the term "employer" "does not include the United States, or a corporation wholly owned by the Government of the United States." Were the term "person" limited to private entities, there would be no need to expressly exclude the United States or publicly owned corporations; that exclusion would be surplusage. This Court is "reluctant to treat statutory terms as surplusage in any setting," and there is no ground to do so here. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Even more revealing is § 630(c). It provides that "[t]he term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States." 29 U.S.C. § 630(c). Here, too, the exclusion of federal agencies would be sur-

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[4] *See Chattanooga Foundry & Pipe Works v. City of Atl.*, 203 U.S. 390, 396 (1906) ("person," which the Sherman Act, 15 U.S.C. § 7, defines to "include corporations and associations," encompasses municipalities); *City of Lafayette*, 435 U.S. at 394-95 (same for the identical definition in the Clayton Act); *Ricketts*, 297 U.S. at 375 (same for "corporations" under the Bankruptcy Act's definition of "person").

plusage unless governmental entities otherwise qualified as "persons." *See TRW*, 534 U.S. at 31. But even more telling is the fact that § 630(c) singles out *federal* agencies for exclusion while making no mention of *state and local* agencies. Obviously, they are included—and the only way that can be is if state and local agencies are "persons."

This Court has drawn comparable inferences from analogous statutory exclusions. *Ricketts*, for example, read the Bankruptcy Act's definition of "person" to include municipalities in part because several provisions of the statute "expressly exclud[ed] municipal corporations in certain relations." 297 U.S. at 375. Those exclusions confirmed that municipal corporations "were intended to be included when, in the absence of exception, the reference is to 'corporations' generally, or to 'persons.'" *Id.* So too here: The express exclusion of "the United States, or a corporation wholly owned by [it]" means those federal entities are otherwise included. And if the term "person" covers the federal government, then it covers political subdivisions too.

2. Statutory history confirms that the term "person" has always included political subdivisions.

The conclusion that "person" in § 630 encompasses political subdivisions "becomes even clearer when the original wording of the ... provision is taken into account." *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429 (2014). The evolution of the statutory language over time—the statutory history—is "part of the context of the statute." Antonin Scalia & Bryan A.

Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012); *see Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2050 (2017) (statutory history is "instructive"); *see also Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1180 (10th Cir. 2011) (Gorsuch, J.) (proper reading of statute was "amply confirmed by the Act's statutory cross-references and history and by the circumstances surrounding its adoption"). And here, that context confirms that the term "person" has always included governmental entities.

Section 630(a)'s definition of "person" has been the same from the start. But § 630(b)'s definition of "employer" has changed. In 1967, its first sentence, like the current version, defined certain "persons" as employers. *See* Pub. L. No. 90-202, § 11(b), 81 Stat. 605. But § 630(b)'s second sentence originally excluded all governmental entities: It said that the term "employer" "does not include the United States, a corporation wholly owned by the Government of the United States, or *a State or political subdivision thereof*." *Id.* (emphasis added). That must mean that the term "person" has, from the moment of enactment, encompassed local governmental entities. If "person" did not extend that far, Congress would not have needed to exclude "political subdivisions."

3. The Ninth Circuit ignored the first sentence of § 630(b).

The Ninth Circuit ignored all of this when it summarily declared that "political subdivisions are not defined as persons in § 630(a)." Pet. App. 7a n.3. It mistakenly stated that "[t]he parties agree that ... the

term 'person' does not include a political subdivision of a State." Pet. App. 5a.

The Fire District made no such concession. While it did not dwell on the first sentence, it did urge the Ninth Circuit to follow the unanimous line of court of appeals decisions both explicitly and implicitly based on the premise that political subdivisions are "persons." *See* C.A. 34, at 1-3 (relying on *Cink*); C.A. 18, at 18-20 (relying on *Palmer*, *Monclova* and *Kelly*). The Tenth Circuit, for example, explicitly held that "person" must be read to "include political subdivisions." *Cink*, 635 F. App'x at 472 n.4. The Seventh Circuit, too, reasoned that § 630(b)'s second sentence merely "make[s] it clear that states and their political subdivisions are to be *included* in the definition of 'employer'" in preceding clauses—a definition that centers on "persons." *Kelly*, 801 F.2d at 271.

The Ninth Circuit just missed it. And that was its first critical error: Because the court started in the middle, it overlooked the critical term "person" in § 630.

B. Section 630(b)'s second sentence merely clarifies what is included in the first sentence's definition, without adding new categories of employers.

Before one even gets to the second sentence, then, political subdivisions fall within the first sentence of § 630(b) and therefore are subject to that sentence's limitations: They are not covered employers unless they engage in commerce and have at least 20 employees. So, the only way to sustain the Ninth Circuit's

reading is to conclude that something in the second sentence overrides those limitations.

The very notion seems implausible. As explained more fully below (at 40-43), Congress could not have intended to cover public employers who have no impact on commerce. And it is highly unlikely that Congress wanted to burden smaller public employers in ways that it declined to burden private employers, or that Congress would have wanted to single out age discrimination for exceptional treatment when it insulates smaller public employers from suits alleging discrimination on the basis of race, sex, nationality, and disability.

As every other circuit has held, the text of the second sentence does not override the first or invite all these anomalies. It reads:

> The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

In rejecting the majority rule, the Ninth Circuit concluded that "also" inevitably carried what it believed to be the primary dictionary definition, "in addition." Pet. App. 7a-8a. So it thought that § 630(b)'s second sentence defines additional, entirely distinct categories of employers—including States and politi-

cal subdivisions regardless of their size and, presumably, regardless of their effect on commerce. Under the Ninth Circuit's reading, then, § 630(b) has three distinct categories of "employer": "A—person" (who has at least 20 employees and affects commerce); "B—agent of person"; and "C—State-affiliated entities." Pet. App. 6a.

The Ninth Circuit did not even consider the alternative dictionary definition noted above (at 18), that "also" "[e]xpress[es] amplification" or transition. When viewed in context, the phrase "also means" does not signify that these are additional categories of covered employers without regard to size or impact on commerce. Rather, "tending in the same direction" as the first sentence, Oxford English Dictionary (3d ed. 2011), https://tinyurl.com/also-definition, the phrase clarifies that States and their political subdivisions are included in, or incorporated into, the first sentence as employers (within the limits of the first sentence), while the federal government is not.

The Ninth Circuit's reading of the second sentence, however grammatically plausible, is flatly incompatible with the agent clause, and therefore cannot be right. And it is also inconsistent with the ADEA's broader text, context, and statutory history.

1. The agent clause clarifies the scope of § 630(b)'s first sentence without adding a new category of employer.

After laying out its categories A, B, and C, the Ninth Circuit skipped right over B. Eliding critical text, the court asked only how to read the words "also

means ... a State or political subdivision" in isolation, without considering how its interpretation would affect the "any agent" clause that it omitted. *See* Pet. App. 7a-8a. Things look very different when you go from A to B. We start with the agent clause and then proceed to the clause at issue here, defining which governmental entities are included and which are excluded (call it the "governmental clause").

Both clauses follow the transitional phrase "also means." If the phrase "also means" adds a category of employer not covered by the first sentence, then the ADEA defines "any agent" of any person described in the first sentence as an "employer," as the Ninth Circuit indicated. But every court of appeals to construe the ADEA's agent clause has rejected that reading. They all agree that the agent clause merely clarifies § 630(b)'s first sentence, without defining agents as a separate category of employers in their own right. So "also means" operates as a clarification ("includes") not as an expansion ("in addition").

To treat "also means" as an expansion would be unfathomable. If agents were "employers," they would be *independently* liable for discriminatory employment practices. That necessarily follows from the ADEA's remedial provisions. Under § 626(b), any "employer" who violates the ADEA's prohibitions "shall be liable to the employee or employees affected" for backpay and damages. 29 U.S.C. §§ 216(b), 626(b). So if agents are an additional category of "employer," they are individually subject to suit. This would impose unprecedented personal liability on supervisors who act as agents for their own employers in making and car-

rying out employment decisions. Even the human resources functionary who sends a pink slip will be subject to personal liability. So an individual employee could face personal liability not just for the entire retroactive salary of a former colleague but for millions in damages for a class of hundreds of employees.[5]

The courts of appeals have uniformly rejected such extraordinary personal liability for agents.[6] Tellingly, they link their rationale to the neighboring employee minimum. "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994). Reading the statute otherwise "would be incongruous." *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994). It would insulate the coffers of a 19-person company from the ADEA's

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[5] *See, e.g.*, EEOC, *3M to Pay $3 Million to Settle EEOC Age Discrimination Suit* (August 22, 2011), https://tinyurl.com/ybfqb9fc (noting $3 million settlement of ADEA claims by class of "hundreds of employees"); EEOC, *Republic Services to Pay Nearly $3 Million for Firing Older Workers Because of Age* (September 29, 2010), https://tinyurl.com/yd44qzjf (noting $2.9 million class action settlement under the ADEA).

[6] *See Sabouri v. Ohio Dep't of Educ.*, 142 F.3d 436, at *2 (6th Cir. 1998) (unpublished); *Martin v. Chem. Bank*, 129 F.3d 114, at *3 (2d Cir. 1997) (unpublished); *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 n.8 (7th Cir. 1997); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993).

remedies, while subjecting the construction foreman or human resources functionary to crushing liability.

Instead, the circuits have unanimously interpreted the agent clause to carry a more prosaic and sensible function: clarifying the scope of § 630(b)'s first sentence by explaining what is included. Specifically, the agent clause establishes that persons who qualify as "employers" are subject to principles of agency liability, including respondeat superior. *E.g.*, *Birkbeck*, 30 F.3d at 510. For all the same reasons, the circuits have unanimously reached the same conclusion as to the essentially identical agent clauses in the ADEA's sister statutes, Title VII and the ADA. 42 U.S.C. §§ 2000e(b), 12111(5)(A). That includes all 12 regional circuits interpreting Title VII's agent clause[7] and every circuit to consider the issue under the ADA.[8]

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[7] *See Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *Fantini v. Salem State Coll.*, 557 F.3d 22, 30 (1st Cir. 2009); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Dici v. Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180-81 (4th Cir. 1998); *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990); *Hiler v. Brown*, 177 F.3d 542, 546 (6th Cir. 1999); *Williams v. Banning*, 72 F.3d 552, 553-55 (7th Cir. 1995); *Smith v. St. Bernards Reg'l Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994); *Miller*, 991 F.2d at 587-88; *Haynes v. Williams*, 88 F.3d 898, 898-899 (10th Cir. 1996); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

[8] *See Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 52 (1st Cir. 2011); *Walsh v. Nev. Dep't of Human Res.*,

So construed, the ADEA's agent clause is consistent with the statute's broader structure. And it still plays a critical role of including agency principles that the statute could otherwise be read to exclude. *See Monell*, 436 U.S. at 691 (§ 1983 does not impose respondeat superior liability on municipal "persons"); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 283-85 (1998) (Title IX of the Civil Rights Act does not impose respondeat superior damages liability on educational institutions).

2. Like the agent clause, the governmental clause clarifies the scope of § 630(b)'s first sentence by specifying which public entities it includes in its coverage.

Because the Ninth Circuit did not even address the unanimous consensus regarding the agent clause, it did not confront the central paradox of its reading: For the governmental clause to add a new category of liability for States and political subdivisions, the word "also" in § 630(b)'s second sentence must change meaning depending on which clause it modifies. On the one hand, according to the decision below, the governmental clause defines a new category of employers—state agencies and political subdivisions of any

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471 F.3d 1033, 1037-38 (9th Cir. 2006); *Hunt v. District of Columbia*, No. 02-7044, 2002 WL 1997987, at *1 (D.C. Cir. Aug. 29, 2002); *Corr v. MTA Long Island Bus*, 199 F.3d 1321, at *2 (2d Cir. 1999) (unpublished); *Butler v. City of Prairie Vill.*, 172 F.3d 736, 744 (10th Cir. 1999); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995); *see also Koslow v. Pennsylvania*, 302 F.3d 161, 178 (3d Cir. 2002).

size. As to that clause, "also" means "in addition." Pet. App. 7a. On the other hand, as all seem to agree, the agent clause does not define a new class of employers, but merely clarifies what is included in the previous sentence. It's Schrödinger's clause.

That is an interpretive impossibility. As this Court has admonished, "[a] term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a *single* formulation ... the same way each time it is called into play." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (citation omitted); *see Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one.").

If the phrase "also means" can have only one meaning as to both clauses, the only plausible solution is the majority reading: The phrase clarifies what is included in the definition of "employer" in § 630(b)'s first sentence, without separately delineating additional categories of employers. Specifically, it denotes which governmental entities are included in the previous sentence and which are not.

The clause's structure and syntax support this reading in at least two ways. First, given that § 630(b)'s first sentence already defines employer to include political subdivisions with at least 20 employees, it would be odd for Congress to choose the current language of the second sentence merely to add coverage for smaller political subdivisions. That would be like drafting a statute that "covers all humans over

the age of 20" and then saying it "also covers all left-handed people." If Congress had some reason to adopt such an odd structure, it would have avoided the inevitable confusion by saying "[i]t also means ... political subdivisions of fewer than twenty employees" or "it also means political subdivisions of any size," just as Congress would say "also covers all left-handed people regardless of age" in the example above if that is what it meant.

Second, "in addition" does not capture what the governmental clause achieves because that clause does not just add, but also subtracts. It identifies governmental entities that *are* covered and entities that are not covered. The whole structure is more along the lines of clarifying what is "included" than of stating what is "added."

This Court has had no problem adopting constructions that depart from a standard dictionary definition where compelled by the surrounding text. *Yates*, for example, declined to give the phrase "'tangible object' a meaning as broad as its dictionary definition" because "context ... tugs strongly in favor of a narrower reading." 135 S. Ct. at 1083 (plurality opinion); *see also id.* at 1089 (Alito, J., concurring in the judgment). Similarly, in *Bloate v. United States*, this Court rejected a construction of the Speedy Trial Act that "rests upon a dictionary definition of two isolated words" because it "does not account for the governing statutory context." 559 U.S. 196, 205 n.9 (2010).

Most on point is *McNally v. United States*, 483 U.S. 350 (1987). There, a statute proscribed conduct using two distinct phrases linked by the word "or":

"any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (emphasis added), *superseded by* Anti-Drug Abuse Act of 1988, Pub. L. 100-690 § 7603(a), 102 Stat. 4184, 4508. The issue before the Court paralleled the question presented here: whether "the money-or-property requirement of the latter phrase" also applies to the "scheme or artifice to defraud" mentioned in the first phrase—even though the two phrases are separated by a connecting term that is ordinarily disjunctive. *McNally*, 483 U.S. at 357-58.

This Court recognized that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property." *Id.* at 358. After considering how the language fit into the broader statutory scheme, however, the Court rejected the primary definition: The money-or-property requirement applied to both phrases, and the second phrase merely *clarified* the first by making it "unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359. In keeping with *McNally*, the Court recently reaffirmed that "statutory context can overcome the ordinary, disjunctive meaning" of connecting terms like "or." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018).

The ADEA's context does exactly that with respect to the ordinary, additive meaning of "also." As in *McNally*, compelling textual and structural evidence outweighs the dictionary's generic reference.

3. Statutory history confirms that the function of § 630(b)'s second sentence has always been to clarify the scope of the first.

Had § 630(b)'s drafters started from scratch, they almost certainly would have found a clearer way to convey this meaning. But they reached the current language by amending an earlier version. The phrase "also means" was already in the second sentence—and has always meant "includes," functioning to clarify the scope of the first sentence.

As originally enacted, § 630(b) had three basic syntactic elements. It had a definitional baseline—call it [A]—the same definitional first sentence as the current version. Then came a second sentence with two-part inclusion/exclusion structure: "[B] The term [employer] *also means* any agent of such a person, [C] but such term *does not include* the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof." Pub. L. No. 90-202, § 11(b), 81 Stat. 605 (emphasis added). The "also means" clause [B] was thus a clause of inclusion: It clarified that the aforementioned employers were subject to basic principles of agency liability, as discussed above (at 27-31). And the "but" clause [C] was a term of exclusion: It subtracted governmental entities from the coverage of the baseline definition [A].

When Congress amended the ADEA, it maintained all of § 630(b)'s syntactic elements in the same structure: [A] a definitional baseline in the first sentence; [B] a clarifying "also means" clause of inclusion; and [C] a "but" clause excluding certain governmental entities. The only difference is that Congress shifted States and political subdivisions from [C] to [B]—from the governmental exclusion element to the clarifying clause of inclusion. (At the same time, Congress clarified that "any agency or instrumentality of a State or a political subdivision of a State" is also covered. 29 U.S.C. § 630(b).) One can imagine the drafters thinking that they achieved the desired clarification simply by moving political subdivisions from one side of the ledger to the other, along the lines of the edits indicated on page 4. Because "also means" merely clarified that principals could be liable for acts of agents, the drafters were justified in believing that the phrase would retain the original, clarifying meaning.

The result may not be a model of drafting precision. But when considered in light of the statutory history and read in light of its statutory context, it is easy to see how the drafters intended this provision to work. And this confirms that the construction endorsed by every other circuit is superior.

C. Any ambiguity must be resolved in favor of applying the minimum-employee requirement.

If the text, context, and statutory history are not enough, two canons of construction resolve any ambiguity in favor of the minimum-employee requirement:

(1) the prohibition against reading a statute to interfere with state governments without a clear statement from Congress; and (2) the doctrine of constitutional avoidance.

1. This Court has long recognized that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). For this reason, courts may not read statutes to override the "usual constitutional balance of federal and state powers" where Congress has not clearly expressed its intention to do so. *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting *Gregory*, 501 U.S. at 460).

Gregory applied this principle to the ADEA. The question there was whether the statute's protections—indisputably available to many state employees—extended to state judges in particular. 501 U.S. at 460. If judges were covered, States would have reduced "power to define the qualifications of their officeholders" by setting a mandatory judicial retirement age. *Id.* at 468. This Court held that it was improper to read the ADEA to intrude on "state governmental functions" in that manner without a clear statement from Congress. *Id.* at 470. Because the ADEA was ambiguous as to its application to judges, the Court read the ADEA not to apply. *Id.*

The same principle applies here, on two dimensions. First, recall that § 630(b)'s second sentence lists not just political subdivisions, but also "any agency or instrumentality of a State." The Ninth Circuit thus

read that sentence to expand *state* liability by sweeping in the small "agenc[ies] or instrumentalit[ies] of a State" along with small political subdivisions like the Fire District. The Ninth Circuit's reading will thus prohibit smaller state agencies from laying off certain employees. It will also require those agencies to hire back employees it has discharged. *See* 29 U.S.C. § 216(b) (allowing for reinstatement as a form of equitable relief).

Second, this reading overrides state judgments as to what sized agencies and political subdivisions can tolerate the burdens of age-discrimination litigation. Many States have chosen to enact their own antidiscrimination statutes, but to exempt state agencies and political subdivisions with less than a certain minimum number of employees. To take the most extreme example, Alabama's Constitution exempts state agencies altogether. *EEOC v. Walker Cty. Bd. of Educ.*, No. 6:10-CV-02626-LSC, 2012 WL 13020711, at *7 (N.D. Ala. Jan. 30, 2012). Arizona—the State where this case arises—has a Civil Rights Act that covers employers (including state agencies and political subdivisions) with at least 15 employees. Ariz. Rev. Stat. § 41-1461(6), (10) (definition provisions); *see id.* § 41-1463(B) (prohibiting age-based employment decisions). It has thus made the judgment that small fire districts, like Petitioner, and state agencies, like the Prescott Historical Society,[9] should be exempt from

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[9] *See* Arizona Dep't of Admin., *State of Arizona Workforce Report 2016* (hereinafter "*Arizona Workforce*") at 43 (2016), https://tinyurl.com/yd5jvbyj (as of 2016, Prescott Historical Society was an agency with 11 employees).

the burden of age discrimination litigation. Numerous other States have made similar judgments. The analogous age-based statutes in Alabama (for political subdivisions), Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, and South Carolina also have employee minimums of either 15 or 20.[10] Still other States have decided that single-digit employee minimums are appropriate; they are California (at least 5 employees), Connecticut (3), Delaware (4), Kentucky (8), Missouri (6), New Hampshire (6), New Mexico (4), New York (4), Virginia (5), and Washington (8).[11] Doubtless these States adopt these limits based on their own unique understanding of what burdens their own smallest governmental entities can bear.

On either dimension, the Ninth Circuit's reading of the ADEA would represent a substantial intrusion on "state governmental functions." *Gregory*, 501 U.S. at 468. Congress has the power to do this if it desires. But "[i]t is a power that [this Court] must assume Congress does not exercise lightly." *Id.* at 460. And certainly it does not exercise it ambiguously. If the question were close, the principle that Congress does not silently override state legislative regulation of its

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[10] Ala. Code § 25-1-20; Fla. Stat. § 760.02; Ga. Code § 45-19-22; La. Stat. § 23:302; Md. Code, State Gov't § 20-601; Nev. Rev. Stat. § 613.310; N.C. Gen. Stat. § 143-422.2; S.C. Code § 1-13-30.

[11] Cal. Gov't Code § 12926; Conn. Gen. Stat. § 46a-51; 19 Del. Code § 710; Ky. Rev. Stat. § 344.030; Mo. Stat. § 213.010; N.H. Rev. Stat. § 354-A:2; N.M. Stat. § 28-1-2; N.Y. Exec. Law § 292 (McKinney); Va. Code § 2.2-3903(B); Wash. Rev. Code § 49.60.040.

own agencies and employees would tip the scales toward the majority rule.

The Ninth Circuit turned *Gregory* on its head by demanding a clear statement that the ADEA does *not* apply to smaller state agencies and political subdivisions. It noted that Congress could have chosen statutory language that would have more clearly preserved a State's prerogative to hire or fire its own employees or excluded the smallest governmental entities. *See* Pet. App. 10a. But *Gregory* confronted, and rejected, this erroneous inversion of the clear statement rule. It recognized that the ADEA's language excluding state judges was "odd"—and that a more "efficient phrasing" was possible. 501 U.S. at 467. But the Court emphasized that "in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Id.*

If one proposition is clear from the briefs in this case—and the circuit split—it is that Congress did not *clearly* indicate an intention to interfere with state functions regarding the smallest agencies and political subdivisions. That reading is therefore improper.

2. For all the focus so far on the 20-employee minimum in the first sentence of § 630(b), we cannot forget that the same sentence has another limitation: The ADEA applies only to "a person engaged in an industry affecting commerce." If § 630(b)'s second sentence overrides the employee minimum, then it overrides the "affecting commerce" limitation as well.

So under the Ninth Circuit's reading, Congress extended the ADEA even to state agencies and political subdivisions that have no effect on commerce.

That would raise serious constitutional questions. This Court has repeatedly noted that the ADEA's coverage of public employers—no less than private businesses—is an "exercise of Congress' powers under the Commerce Clause." *Gregory*, 501 U.S. at 464 (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). And other statutes show that when Congress brings public entities within the reach of federal power, it includes a Commerce Clause hook. Title VII, the ADA, and the Fair Labor Standards Act, for example, all include provisions that expressly qualify the public entities they reach as those engaged in an "industry affecting commerce" or an "enterprise engaged in commerce." 42 U.S.C. § 2000e(a), (b) (Title VII); *id.* § 12111(5)(A) (ADA); 29 U.S.C. § 203(s)(1)(C), (x) (FLSA). Without the Commerce Clause hook, Congress would have no stated constitutional authority for reaching a state agency or political subdivision. For this reason alone, the doctrine of constitutional avoidance, which "militates against" statutory interpretations that raise "serious questions of constitutionality," negates the Ninth Circuit's reading. Scalia & Garner, *supra*, at 247-48; *see, e.g.*, *Clark*, 543 U.S. at 380-81 (interpretation that does not "raise a multitude of constitutional problems ... should prevail"); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979).

If the second sentence does not negate the first sentence's "affecting commerce" limitation, then it cannot negate the 20-employee minimum either. Indeed, the "affecting commerce" limitation works

hand-in-glove with the employee threshold. Employee thresholds like these can be viewed as reflecting "Congress's determination ... that any employer" above the stated employee threshold "necessarily implicates interstate commerce." *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991). Aspects of Title VII's legislative history support that view: "The bill proceeds upon a theory ... that the quantum of employees is a rational yardstick by which the interstate commerce concept can be measured." H.R. Rep. No. 88-914 at 2475 (1963) (separate minority views of Reps. Poff and Cramer). That does not necessarily mean that Congress could not constitutionally reach a company with only 19 employees. But Congress did understand that a complete abandonment of all employee thresholds would raise constitutional issues.

Consider the ramifications: States have created countless agencies, commissions, and local entities with no meaningful effect on interstate commerce: the Prescott Historical Society, for example, which exists to preserve certain properties in the small city of Prescott, Arizona;[12] or the Franklin Township Cemetery District, whose sole employee maintains the cemeteries in a small Illinois town.[13] Under the Ninth Circuit's approach, the Cemetery District's sole employee could sue for age discrimination if the district concludes it can no longer afford him and will handle the

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[12] *See* Arizona State Library, Archives & Public Records, *Prescott Historical Society* (2016), https://tinyurl.com/y83dpeaq.

[13] *See* Franklin Township, *Township Cemeteries*, https://tinyurl.com/y7nvkj8n; Illinois Comptroller, *Financial Databases*, https://tinyurl.com/yb36wnoc (listing one employee for Franklin Township Cemetery District as of 2016).

function with volunteers or contractors. A sole employee could sue even if he worked only a few hours a year. In fact, a job applicant could sue any of these agencies even if the agency had no employees but merely interviewed her in contemplation of possibly creating a position. None of these scenarios would have any appreciable effect on interstate commerce. And without an effect on interstate commerce, the application would be unconstitutional. *See United States v. Morrison*, 529 U.S. 598, 609 (2000).

This Court must avoid these constitutional landmines, *see* Scalia & Garner, *supra*, at 249, by interpreting both limitations in § 630(b)'s first sentence to apply to all state agencies and political subdivisions.

II. Applying The ADEA's Employee Minimum To Political Subdivisions Best Achieves Congress's Stated Purpose And Aligns The ADEA With Other Antidiscrimination Statutes.

In rejecting the unanimous reading of the other circuits, the Ninth Circuit injected two incongruities that are at odds with Congress's stated and demonstrated intention. First, Congress's stated goal was to place public and private employers on an equal footing. Second, Congress intended to harmonize the ADEA with other antidiscrimination statutes that share its basic purposes and substantive scope. The Ninth Circuit's reading does just the opposite: It creates untenable rifts in how the ADEA treats public and private entities, and puts the ADEA out of sync with other antidiscrimination statutes. The Ninth

Circuit gave no plausible reason why Congress would have adopted such an incongruous approach, when only our reading "produces a substantive effect that is compatible with the rest of the law." *Koons*, 543 U.S. at 60.

A. The ADEA is part of a trio of antidiscrimination statutes designed "to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). The ADEA's principal comparator in terms of "aims" and "substantive prohibitions" is Title VII. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). As this Court has recognized, "[t]he ADEA and Title VII share common substantive features and also a common purpose." *McKennon*, 513 U.S. at 358. And Congress borrowed the ADEA's substantive prohibitions largely "*in haec verba* from Title VII." *Lorillard*, 434 U.S. at 584. The ADA, passed in 1990, followed the model of both Title VII and the ADEA. *See McKennon*, 513 U.S. at 357.

The ADEA and Title VII grew up side-by-side, and Congress has often looked to one to determine how the other should function. That is precisely what Congress did with regard to coverage of governmental entities. Both statutes started out excluding coverage for all governmental entities. *Supra* at 7; Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253. Then, Congress simultaneously worked on amendments to both statutes, adding States and their political subdivisions, but retaining the exclusion for the federal government. *See* Pub. L. No. 92-261, 86 Stat. 103 (bill amending Title VII, passed March 24, 1972); 118 Cong. Rec. 15894 (May 4, 1972) (statement of Sen. Bentsen) (noting March 7, 1972 introduction

of ADEA amendments). Congress passed the amendments to Title VII first, in 1972. There is no dispute that, under that amendment, States and their political subdivisions were subject to the same employee minimum that applies in the private sector. *See* Pub. L. No. 92-261, § 701(b).

The ADEA amendments were intended to mirror the revisions to Title VII by "put[ting] public and private employers on the same footing." *Kelly*, 801 F.2d at 271. When introducing the bill nearly contemporaneously with the passage of the Title VII amendments, the bill's sponsor, Senator Bentsen, explained that the bill duplicates Title VII's public-private parity. He quoted the committee report on the Title VII amendments, which emphasized that "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy." 118 Cong. Rec. at 15895. And he argued that "the principles underlying these provisions in the EEOC bill are directly applicable to the [ADEA]." *Id.*

The following year, a special Senate committee on age discrimination issued a working paper reflecting the same parity principles. Special S. Comm. on Aging, 93d Cong., Improving the Age Discrimination Law (Comm. Print 1973). The committee observed that it was "difficult to see why one set of rules should apply to private industry and varying standards to government." *Id.* at 17. So, when urging the President to sign the bill into law, Senator Bentsen emphasized that "Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector."

120 Cong. Rec. 8768 (Mar. 28, 1974) (statement of Sen. Bentsen). Nothing in the legislative materials suggests that the public entities newly covered under the ADEA would be treated any differently from their private sector counterparts or differently from entities under Title VII. *Cf. Kelly*, 801 F.2d at 272 (noting that no congressional report "drew any distinction between the coverage of public and private employers").

B. The Ninth Circuit's reading creates disparities in the ADEA's treatment of public and private employers that Congress could not possibly have intended. In doing so, it also creates conflicts between the ADEA and its sister statutes that defy explanation. These disparities arise along three dimensions: the employee minimum, the "industry affecting commerce" requirement, and respondeat superior liability. Taken together, they would create a fractured and incoherent federal antidiscrimination regime.

Employee Minimum. First, of course, is the rift directly at issue here: Small private employers would be exempt from the ADEA, while small public employers would not. That distinction makes no sense. Congress has several reasons for exempting smaller employers from discrimination suits—every one of which applies with at least equal force to public entities:

1. As discussed more fully below (at 54-57), discrimination suits and compliance costs can be so burdensome as to sink an employer with a small budget.

2. Small employers have less staffing flexibility, so it is harder for them to preserve a job to avoid allegations of discrimination. *See Age Discrimination in Employment: Hearings before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare Committee on S. 830 and S. 788*, 90th Cong., at 47 (March 15, 16, and 17, 1967) (statement of Secretary of Labor Wirtz).

3. Congress wanted to conserve the EEOC's resources by focusing it on employers with a greater impact on the marketplace, leaving it to state and local authorities—if they so choose—to monitor discrimination in the many thousands of smaller workplaces. *See id.*

4. Relatedly, as discussed above (at 40-43), a smaller employer has less of an impact on interstate commerce, and so size is a crucial justification for Congress's decision to extend federal law under the Commerce Clause.

The Ninth Circuit offered no persuasive reason to view private and public employers as different in any of these respects. It merely posited that one might "imagine policy reasons" for the differential treatment. Pet. App. 16a n.10. "Perhaps," the court of appeals speculated, "Congress thinks that government agencies, even very small ones like the Fire District, can better bear the costs of lawsuits than small private-sector businesses or that government should be a model of non-discrimination." *Id.* Common sense and experience suggest that an 11-employee fire district is no better able to absorb extraordinary costs

than an 11-employee for-profit enterprise. And there is no evidence—and no reason to believe—that Congress specifically wanted to make an example of smaller state agencies and local governments as compared to private employers of the same size.

Different employee minimums for the public and private sectors are even less tenable in light of Title VII. That statute—along with the ADA—applies the same 15-employee minimum to public and private employers alike. *See* 42 U.S.C. §§ 2000e(b), 12111(5)(A). Under the Ninth Circuit's reading, therefore, the ADEA applies *more broadly* than its sister statutes in the public sector (where it imposes no employee minimum), but *more narrowly* in the private sector (where it imposes a higher 20-employee minimum).

It's inexplicable. Nothing in the text or legislative history of the ADEA or Title VII provides a basis for this incongruity. If anything, one would expect Title VII's coverage to be uniformly broader than coverage under the ADEA. Race, religion, nationality, and sex enjoy a high degree of protection under the Constitution; state action targeting such characteristics is subject to heightened scrutiny. *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("race, alienage, or national origin"; strict scrutiny); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (religion; strict scrutiny); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2004) (sex; heightened scrutiny). But age-based classifications will rarely, if ever, violate the Constitution as long as they rest on proper state interests. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

Consistent with that distinction, Title VII's coverage in the *private* sector is broader than the ADEA's coverage—suggesting that "the problems addressed by Title VII" are "more serious than the problem of age discrimination." *Kelly*, 801 F.2d at 273 (citing *Wyoming*, 460 U.S. at 231). So it would be puzzling indeed for Congress to have flipped that hierarchy in the public sector, imposing more extensive coverage for less constitutionally suspect behavior.

Moreover, Title VII and the ADA squarely undercut the Ninth Circuit's speculation that Congress believed the smallest governmental entities "can better bear the costs" of litigation than private businesses. Pet. App. 16a n.10. Discrimination suits pose the same burdens whether they are based on age or on race, color, religion, sex, national origin, or disability. And Congress saw fit to exempt the smallest governmental employers from discrimination claims on all the latter bases. So it could not have reached some unstated, undocumented, and unfathomable conclusion that smaller state agencies and political subdivisions can better absorb the costs imposed by federal antidiscrimination law. Relatedly, there is no plausible reason that Congress would have wanted state and local governments to be "model[s] of non-discrimination," *id.*, in the context of age but not occupy the same iconic status regarding race, sex, religion, or disability.

Industry Affecting Commerce. As already demonstrated (at 40-43), the Ninth Circuit's reading also means that the ADEA reaches state agencies and political subdivisions that do not "affect[] commerce." Even if that were constitutionally permissible, it

would make no sense to selectively eliminate the congressional justification for public employers alone. As discussed (at 37-40), Congress must be more explicit about extending federal power to state and local governments than to private employers.

Here, too, this anomaly is even more pronounced in light of Title VII and the ADA, which expressly provide that public entities are covered only insofar as they affect commerce. *See* 42 U.S.C. §§ 2000e(b), 12111(5)(A). There is no plausible reason to believe Congress wanted the Commerce Clause hook for two antidiscrimination statutes and not for the comparable third.

Respondeat Superior. Perhaps most startling of all, the Ninth Circuit's reading would also eliminate respondeat superior liability for all States and political subdivisions (of any size), while retaining it for private employers. Here is why: Under that reading, States and political subdivisions are not "person[s]" included in § 630(b)'s first sentence; they are an additional category of (non-person) employer added by the second sentence of § 630(b). That clause in the second sentence is not modified by the words "any agent of such a person," the basis for private-employer respondeat superior liability under § 630(b). So there would be no basis for imposing respondeat superior liability on public entities.

This, too, would be inexplicable even on its own terms. Under the Ninth Circuit's approach, private businesses would be liable for the discriminatory acts of their employees, incentivizing those businesses to eradicate discrimination by their personnel and

providing for compensation to adversely affected individuals where appropriate. But state and local governments would face liability only for their own official decisions and practices, and not for the unsanctioned acts of supervisors. There is no reason Congress would have wanted that—especially when it said it wanted to give public and private employees the same recourse. Nor can the notion be reconciled with the Ninth Circuit's hypothesis that Congress wanted to elevate state and local governments as paragons of non-discrimination.

Again, this feature of the Ninth Circuit's reading also creates an irreconcilable disparity between the ADEA and its sister statutes. Title VII and the ADA also codify respondeat superior through agent clauses. *See* 42 U.S.C. §§ 2000e(b), 12111(5)(A). But those clauses apply to public as well as private employers. *See id.* So when it comes to discrimination on the basis of race, sex, nationality, religion, or disability, state and local employers generally must answer for the unsanctioned acts of their employees. It would be strange to abandon those fundamental agency principles for age discrimination.

***

Together, these anomalies yield a haphazard ADEA. Under the Ninth Circuit's reading, the statute draws illogical distinctions between identically sized public and private entities. Worse still, the ADEA is at once broader and narrower than Title VII and the ADA with respect to small public employers. On the one hand, the ADEA would cover public employers of any size, while Title VII and the ADA subject these

employers to their employee minimums. But on the other, public entities are subject to a statutory Commerce Clause hook and to respondeat superior liability for purposes of Title VII and the ADA, yet not so under the ADEA. There is no rhyme or reason for this grab-bag of fundamental distortions.

C. The Ninth Circuit offered no rationale for why Congress would have sought to draw any of these distinctions. It just dismissed these problems because Congress amended Title VII in 1972 "us[ing] different language than it used in the 1974 ADEA Amendment." Pet. App. 15a. In the Ninth Circuit's view, "[i]f Congress had wanted the 1974 ADEA Amendment to achieve the same result as the 1972 Title VII Amendment, it could have used the same language." *Id.*

That might be persuasive if the two statutes had started in the same place. But they started with different phrasing. So it is only natural that they took a different route to the same place. Title VII started with a narrower definition of "person" than the ADEA. Congress expanded Title VII's reach to state and local governments in 1972 by amending that provision as follows:

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in ~~bankruptcy~~ cases under title 11, or receivers.

Compare 42 U.S.C. § 2000e(a), *with* Pub. L. No. 88-352, § 701(a). Note that Title VII's definition of person did not encompass "any ... organized groups of persons," as the ADEA did. Consequently, the drafters could have been concerned that state and local governments were not clearly covered by the narrower definition of person, and therefore would not have been viewed as "employers" if Congress simply removed the express exclusion of state and local governments from the definition of employer. So rather than amend the definition of "employer," they opted to amend the definition of "person," and then maintain only the federal government exclusion in the next section, as follows:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has ~~twenty-five~~ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or ~~a State or political subdivision thereof~~ any department or agency of the District of Columbia....

Compare 42 U.S.C. § 2000e(b), *with* Pub. L. No. 88-352, § 701(b). Notice also that this original definition of "employer" did not have the same "also means" locution as the ADEA's. So the drafters did not have the same simple option of moving a category from the exclusion side of the ledger to the inclusion side. To follow Title VII's model in the ADEA would have

entailed much more rewriting than the approach the drafters took.

In short, no inference can be drawn from the apples-to-oranges revisions. The fact that Congress enacted somewhat distinct changes to two statutes that were worded differently to begin with does not mean that Congress had different purposes in mind. Here, Congress aimed for harmony between Title VII and the ADEA, and the Ninth Circuit disregarded that understanding.

III. The Ninth Circuit's Rule Threatens The Survival Of Small Political Subdivisions.

The Ninth Circuit's reading of § 630 would have devastating effects on small state agencies and political subdivisions, a result Congress would not have intended. As indicated above (at 46-47), employee minimums serve important and salutary purposes, which apply to small political subdivisions like the Fire District just as much as they apply to small businesses. One purpose in particular bears elaboration: "to spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999); *see Arbaugh v. Y & H Corp.*, 546 U.S. 500, 504 (2006); *Miller*, 991 F.2d at 587.

Small political subdivisions are especially vulnerable. They provide crucial services—fire protection, public safety, healthcare, utilities, pest control, and

the like—often in rural and sparsely populated communities. But their funding is usually modest. *See* Int'l Munic. Lawyers Ass'n Amicus Br. § II; Arizona Fire District Association, *Fiscal Year 2017/2018 Fire District Required Budget Postings*, https://tinyurl.com/y7sybnva. The Fire District is a prime example. A small employer that tries to make ends meet with bake sales, *supra* at 11, is not the sort of employer that is well positioned to survive the expense of federal age discrimination litigation.[14]

The costs of learning a complex federal regulatory scheme alone are substantial. But a single litigation could bring a small governmental entity to a halt for years and even put it out of business. *See* Hiscox, *Guide to Employee Lawsuits* 7 (2017) (finding an average employment discrimination matter takes 318 days to resolve). One study found that out "of 1,214 closed claims reported by small- to medium-sized enterprises (SMEs) with fewer than 500 employees ... 24% of employment charges resulted in defense and settlement costs averaging a total of $160,000." *Id.* Even with insurance, small employers bore a significant portion of those costs. *See id.* ($50,000 average deductible).

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[14] That is why, for example, Congress was sure to single out the smallest fire and police departments as employers exempt from the Fair Labor Standards Act. *See* 29 U.S.C. § 213(20). As Representative Frenzel noted, Congress was worried that requiring such departments to pay overtime would "force municipalities to reduce their fire protection service." 120 Cong. Rec. 8605 (Mar. 28, 1974).

If the Ninth Circuit's decision becomes the law of the land, those costs will be brought to bear far and wide. There were over 38,000 special districts across the country in 2012. U.S. Census Bureau, *Special District Governments, supra*; U.S. Census Bureau, *State Descriptions, supra*, at x. A large percentage of those have fewer than 20 employees. For example, according to public data, Illinois had 1671 special districts with employees in 2016; over 60% of them had fewer than 20 employees. *See* Illinois Comptroller, *Financial Databases*, https://tinyurl.com/yb36wnoc. Even applying a more conservative estimate that, say, one-third of the country's special districts have fewer than 20 employees, that means over *12,000* entities are potentially affected.

The Ninth Circuit's decision extends to small state agencies as well. A substantial number of state agencies have fewer than 20 employees: 20 agencies out of 68 total in Arizona, 25 out of 89 in Idaho, 23 out of 77 in Oregon, and 33 out of 97 in Washington, just to name a few examples in the Ninth Circuit alone.[15] Even though private plaintiffs cannot directly sue state agencies for money damages, *Kimel*, 528 U.S. at

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[15] Arizona Dep't of Admin., *Arizona Workforce, supra* n.9, at 39-44; State of Idaho, *Active Employee Counts* (last updated May 4, 2018), available at https://tinyurl.com/cy25xp6 (click "Crunch the Numbers"); State of Oregon Legislative Fiscal Office, *2017-19 Budget Highlights* at C-1–C-3 (September 2017), https://tinyurl.com/ycv7qb48; State of Washington Office of Financial Management, *Distribution by State Agency* (last updated Apr. 16, 2018), available at https://tinyurl.com/ycxvbywc (click "Number of State Employees by Agency and County").

91, States and their agencies are still subject to the ADEA. The EEOC may enforce the statute in full, as multiple circuits have recognized. *EEOC v. Bd. of Supervisors for Univ. of La. Sys.*, 559 F.3d 270, 273 (5th Cir. 2009); *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (extending *Kimel*'s reasoning to ADA but noting that the statute may still "be enforced by the United States in actions for money damages"). Private plaintiffs may also sue state entities for injunctive relief. *See Meekison v. Voinovich*, 67 F. App'x 900, 901 (6th Cir. 2003); *State Police for Automatic Ret. Ass'n v. DiFava*, 317 F.3d 6, 12 (1st Cir. 2003); *see also Garrett*, 531 U.S. at 374 n.9 (noting that ADA may "be enforced ... by private individuals in actions for injunctive relief under *Ex parte Young*"). Such actions are a significant and longstanding mechanism for enforcing the ADEA. *See Miller*, 991 F.2d at 587; *Harvey*, 913 F.2d at 227-28 & n.2. Exposing public entities to the ADEA regardless of size would have substantial and far-reaching effects.

Congress included an employee minimum in the ADEA and its kindred antidiscrimination statutes for good reasons, and reasons that apply just as strongly for small public entities as private ones. The Ninth Circuit's erroneous reading of the ADEA undermines that legislative choice. This Court should reject the Ninth Circuit's reading and hold that the ADEA's employee minimum exempts small political subdivisions from the statute's coverage.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

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IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,

Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Whether the Age Discrimination in Employment Act (ADEA) carries a numerosity requirement with respect to political subdivisions of states.

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BRIEF FOR RESPONDENTS

Respondents John Guido and Dennis Rankin respectfully request that this Court affirm the judgment of the court of appeals.

STATEMENT OF THE CASE

A. Statutory background

The Age Discrimination in Employment Act (ADEA) prohibits employers from taking certain employment actions on the basis of age. 29 U.S.C. § 623(a). Housed in Title 29—the "labor" title—of the U.S. Code, the statute is designed "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." Pub. L. No. 90-202, § 2(b), 81 Stat. 602, 602 (1967). In service of those ends, the ADEA incorporates the "powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b); *see Lorillard v. Pons*, 434 U.S. 575, 578-80 (1978).

As originally enacted, the ADEA applied only to private employers with twenty-five or more employees. Pub. L. No. 90-202, § 11(b), 81 Stat. at 605. Indeed, the Act expressly excluded states and political subdivisions from its ambit. *Id.* But in 1974, as part of a broader bill also amending the FLSA to cover all governmental employers, Congress expanded the coverage of the ADEA. The 1974 amendments lowered the numerosity requirement governing private employers from twenty-five employees to twenty; added a separate provision covering agencies in the federal government; and extended the ADEA's

mandate to state government entities. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1)-(3), (b)(2), 88 Stat. 55, 74-75 (codified as amended at 29 U.S.C. §§ 630, 633a).

As amended, Section 630(b) of the ADEA, which defines the term "employer" for purposes of the Act's coverage, provides in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. § 630(b).

The Equal Employment Opportunity Commission (EEOC) administers the ADEA. *See* 29 U.S.C. § 628. Since the mid-1980s, the EEOC has taken the position that the twenty-employee minimum does not apply to political subdivisions. *See Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270 n.1 (7th Cir. 1986); *see also EEOC v. Monclova Township*, 920 F.2d 360, 362 (6th Cir. 1990) (noting the EEOC's position that the text of Section 630(b) "unambiguously excludes [political subdivisions] from the minimum number of employees requirement" and that "no reason exists to avoid [Section 630(b)'s] statutory language"). The EEOC now codifies this position in its compliance manual. *See* U.S. Equal Emp't Opportunity Comm'n,

Compliance Manual § 2-III(B)(1)(a)(i) (2009) [hereinafter *EEOC Compliance Manual*] ("A state or local government employer is covered under the ADEA regardless of its number of employees.").

B. Factual and procedural background

1. Respondents John Guido and Dennis Rankin began working in 2000 for petitioner, the Mount Lemmon Fire District. Pet. App. 19a. The Fire District provides fire protection to a 12.5-square mile area of the Santa Catalina Mountains in the Coronado National Forest, just outside of Tucson, Arizona. *See* Mount Lemmon Fire, http://www.mtlemmonfire.org (last visited July 1, 2018). An enclave of second homes—known as Summerhaven—populates the District's upper elevations. *See Mt. Lemmon/Summerhaven Information*, http://mtlemmon.com/summerhaven (last visited July 1, 2018).

By 2005, both respondents had risen within the Fire District to the rank of captain. Pet. App. 19a. They were among the District's most credentialed full-time employees. Mr. Guido was a former officer in the Arizona National Guard, a certified Senior Fire Inspector, and one of the District's two certified paramedics; Mr. Rankin had worked in public safety since 1973, including holding positions as a firefighter and arson investigator. Pls.' Rule 56.1 Statement of Facts ¶¶ 6, 9-10, 20. They were also the two oldest full-time employees: Mr. Guido was forty-six years old, and Mr. Rankin was fifty-four. *Id.* ¶¶ 16, 26, 31.

In 2009, the Fire District confronted a "budget shortfall" of approximately $67,000. Pet. 8; Petr. Br. 11. It was not immediately clear how the District would address the shortfall. But the District's fire chief released a memorandum promising that, in the

event the District had to terminate any employees, its paramedics would have priority for retention. *See* Pls.' Rule 56.1 Statement of Facts ¶ 38. Three months later, the District decided to lay off employees.

The Fire District selected Mr. Guido and Mr. Rankin for termination. It then replaced them as captains with two younger people. One of the replacements was twenty-eight years old with only six years of experience as a firefighter. Pls.' Rule 56.1 Statement of Facts ¶¶ 32-33.

The Fire District later claimed that it laid off Mr. Guido and Mr. Rankin because they had not participated in recent years in voluntary shifts fighting wildland fires. *See* Def.'s Rule 56.1 Statement of Facts ¶ 20. Yet nothing in either Mr. Guido's or Mr. Rankin's letter of termination (or any oral statement accompanying them) discussed wildland fire assignments. Pls.' Rule 56.1 Statement of Facts ¶¶ 46, 53. And one of the employees replacing Mr. Guido and Mr. Rankin as a ranking captain had gone on no such voluntary assignments in the preceding two years either. *See id.* ¶¶ 32, 62-63.

2. Believing the real reason for their terminations was their age, Mr. Guido and Mr. Rankin filed timely charges with the EEOC, alleging that the Fire District had fired them in violation of the ADEA. Pet. App. 3a. After an investigation, the EEOC issued letters finding reasonable cause to believe that the Fire District had indeed violated the ADEA. *Id.*

3. Respondents then filed suit in the U.S. District Court for the District of Arizona, alleging age discrimination under the ADEA.

After a short period of discovery, the Fire District moved for summary judgment. As relevant here, the

Fire District argued that the ADEA covers political subdivisions only if they have twenty or more employees, and it asserted that it had fewer than twenty employees during the relevant time period. Pet. App. 20a-21a.

In a cross-motion for partial summary judgment, respondents disputed both of the Fire District's assertions. First, respondents maintained that because the ADEA's definition of "employer" separates private from public employers and contains no numerosity requirement in the public employer sentence, the statute carries no numerosity requirement for political subdivisions. Pet. App. 21a-22a. Second, respondents contended that, in any event, the Fire District had more than twenty employees. *See id.* 26a-27a. In support of the latter contention, respondents noted that the District listed more than twenty employees on its wage reports, *id.* 29a-31a, and that it also retained additional "volunteers" on its staff, at least two of whom received pension benefits and workers' compensation coverage, *id.* 36a-37a.

The district court granted the Fire District's motion. The court acknowledged that the only published opinion in nearly twenty years dealing with the ADEA's application to political subdivisions had held that the "clear" language of Section 630(b) settles that the statute applies to all political subdivisions, regardless of size. Pet. App. 25a n.4 (citing *Holloway v. Water Works & Sewer Bd.*, 24 F. Supp. 3d 1112, 1117 (N.D. Ala. 2014)). But, with no elaboration, the district court pronounced the provision "ambiguous." Pet. App. 25a. It then elected to follow the Seventh Circuit's 1986 decision in *Kelly v. Wacuconda Park District*,

which held that the ADEA's numerosity requirement applies to political subdivisions because parts of the legislative history indicated the 1974 amendments were designed "to put public and private employers on the same footing," 801 F.2d at 271-72. *See* Pet. App. 22a-25a.

The district court also agreed with the Fire District that it had "no more than 19 qualifying employees." Pet. App. 26a. The court reasoned that only nineteen of the firefighters on the wage reports had in fact worked and been paid during the relevant period, *id.*, and that none of its other associated individuals had received "substantial benefits" from the District, *id.* 37a.

4. Respondents appealed, and the EEOC filed an amicus brief reiterating its "longstanding" position that the ADEA covers "political subdivisions of any size." EEOC C.A.9 Br. 4-5. The Ninth Circuit agreed and unanimously reversed. Pet. App. 17a.

Writing for the panel, Judge O'Scannlain explained that Section 630(b) "is not ambiguous." Pet. App. 14a. The statute's directive that the term "employer" "also means" a political subdivision of a state, the court of appeals explained, "adds another definition" on top of the previous definition of employer relating to private employers; "it does not clarify the previous definition." *Id.* 7a. And because the statute imposes a numerosity requirement only for private employers, the court of appeals concluded that there is no such requirement for political subdivisions. *Id.* 7a, 14a.

Finding the text's meaning to be "plain," the court of appeals found no need to try to surmise Congress's intent. Pet. App. 14a, 16a-17a. It nevertheless

explained that "[e]ven if we agreed with the Fire District and concluded that the statute is ambiguous—which we do not—the outcome would not change." *Id.* 14a. Amendments to Title VII two years before Congress amended the ADEA provided a model of how a numerosity requirement can apply to political subdivisions. *Id.* 15a. But the ADEA's amendments diverge from that model, reinforcing from the panel's perspective that the "best reading" of the ADEA is that Section 630(b)'s twenty-employee minimum "does not apply to a political subdivision of a State." *Id.* 14a-15a.

Finally, the court of appeals noted that the legislative history on which the district court had relied does not "address the specific question before us." Pet. App. 15a. In particular, the "vague language about ensuring the same rules apply" to employees in the public and private sectors "never states that the twenty-employee minimum should apply to political subdivisions." *Id.* 16a. Insofar as the legislative history addresses that question at all, the court of appeals reasoned, it separates public from private employers and suggests the contrary. *Id.*

SUMMARY OF THE ARGUMENT

I. The ADEA provides that the term "employer" "also means . . . [a] political subdivision of a State." 29 U.S.C. § 630(b). The explicit and unqualified nature of this provision dictates that the state's nondiscrimination mandate applies to political subdivisions regardless of size. The statute's coverage of private employers carries a numerosity requirement, but the transitional phrase "also means" creates a distinct, freestanding category of public employers.

All other traditional interpretive tools point in that same direction. For one thing, Title VII provided a ready template if Congress had wished for the 1974 ADEA amendments to cover political subdivisions subject to a numerosity requirement. Yet Congress took a different approach, suggesting it intended a different result. The legislative history of the 1974 amendments supports this inference. Legislators described the changes to the ADEA as a "logical extension" of changes they were making to the FLSA, which was amended to cover political subdivisions without any numerosity requirement. Finally, the EEOC has exercised its informed judgment to conclude that the ADEA applies no numerosity requirement to political subdivisions.

II. The Fire District's counterarguments lack force. It is not anomalous for the ADEA, but not Title VII or the Americans with Disabilities Act, to cover small political subdivisions. The ADEA's powers and remedies—including many definitional provisions—are drawn from the FLSA, which covers political subdivisions regardless of size. Other federal and state laws prohibiting age discrimination and similar labor practices do the same.

Nor does reading Section 630(b) according to its plain terms create problems respecting the statute's coverage of agents of private employers. The agent clause independently covers third-party entities, so it does not matter here whether it also sweeps in individual employees. And because common law principles that are contained in all employment discrimination statutes already ensure that all covered employers are subject to respondeat superior liability for disparate treatment claims, it is

immaterial that Section 630(b) does not have a parallel agent clause respecting public employers.

The Fire District's constitutional arguments similarly lead to dead ends. The federalism canon of construction does not apply to unambiguous statutes. Nor does it apply to statutes that merely establish liability rules for political subdivisions. Furthermore, Congress has ample power under the Commerce Clause to regulate the employment practices of public employers of all sizes—as it has in other statutes.

Finally, Section 630(b) does not threaten to impair the operations of small political subdivisions. Most states have decided on their own to subject such employers to liability for discriminating on the basis of age, and such entities have ample tools for managing any litigation costs that arise. This Court should enforce the ADEA as written.

ARGUMENT

I. The ADEA's coverage of political subdivisions contains no numerosity requirement.

The plain language of 29 U.S.C. § 630(b) makes clear that the ADEA covers political subdivisions without any numerosity limitation. The ADEA's structure, statutory history, and the EEOC's longstanding view confirm that the statute covers all political subdivisions, regardless of size.

A. Section 630(b)'s text dictates that it covers political subdivisions regardless of size.

1. "As always, we start with the specific statutory language in dispute." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). Section 630(b) first defines "employer" to "mean[] a person engaged in an industry affecting

commerce who has twenty or more employees." 29 U.S.C. § 630(b). It then adds that "[t]he term *also means* . . . a State or political subdivision of a State." *Id.* (emphasis added). The question presented thus turns on a simple inquiry: Does "also means" *add* a new category to the definition of "employer," or does it—as the Fire District argues—merely *clarify* the definition provided in Section 630(b)'s first sentence?

No one disputes that "means" in Section 630(b)'s first sentence introduces a definition. *See Mean*, Oxford Eng. Dictionary, https://tinyurl.com/mean-oed-defn (last updated Mar. 2001) (to "mean" is "to convey or carry a meaning"). And the word must have the same function in the second sentence of Section 630(b) as in the section's first sentence. *See NASA v. FLRA*, 527 U.S. 229, 235 (1999) (statutory phrases "ordinarily retain the same meaning wherever used in the same statute"). So the "means" in "also means" must be definitional as well.

That brings us to the word "also." The ordinary meaning of "also" is "in addition." Take, for instance, the hypothetical statement posited by the court of appeals: "The password can be an even number. The password can *also* be an odd number greater than one hundred." Pet. App. 7a-8a (emphasis added). It is unmistakable in this example that the second sentence provides a new and distinct category of passwords. It is likewise clear that "the clarifying language" in the second category (greater than one hundred) "does not apply to both definitions." *Id.* 8a.

The Fire District objects that the two categories in this illustration are "mutually exclusive." Pet. 28. But that is precisely the point. The word "also" is the most natural transition between two categories that are

separate and nonoverlapping. *See Liteky v. United States*, 510 U.S. 540, 566 (1994) (Kennedy, J., concurring in the judgment) ("Congress' inclusion of the word 'also' indicates that subsections (a) and (b) have independent force."). Dictionaries confirm this common-sense understanding. Definitions of "also" suggest addition: "likewise"; "in addition"; "besides"; "too." *See Also*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014); *see also Also*, Oxford Eng. Dictionary, https://tinyurl.com/also-oed-defn (last updated June 2011) (defining "also" as "in addition").[1]

Putting the two words together, it is apparent that the phrase "also means" in Section 630(b) unambiguously introduces a new, freestanding component of the ADEA's definition of "employer." 29 U.S.C. § 630(b). The ADEA covers private "person[s]" with twenty or more employees. It "also" covers states and political subdivisions, regardless of the number of employees.

2. Reading "also means" in Section 630(b) to signal a new, separate part of the definition accords with the

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[1] The Fire District complains that "the Oxford English Dictionary does not even list [this] meaning first." Petr. Br. 18. But the order in which a dictionary lists definitions does not "establish an enduring hierarchy of importance." *See Webster's Third New International Dictionary* 17a (1971). Instead, definitions are listed "in the order in which they . . . have arisen." 1 *Oxford English Dictionary*, at xxviii-xxix (2d ed. 1989). Thus, the best definition "is the one that most aptly fits the context of an actual genuine utterance." *Webster's Third New International Dictionary*, *supra*, at 17a. *See generally* Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. Rev. 1915, 1926-38.

way Congress typically uses the phrase. Beyond Section 630(b), there are thirty-two places in which the U.S. Code uses the phrase "also means."[2] It consistently operates as a restart of a definition, often—as in Section 630(b)—adding components to a term defined in multiple subparts.

Take 15 U.S.C. § 1471(3), which defines the term "package." It begins by defining "package" to "mean[] the immediate container or wrapping in which any household substance is contained." *Id.* The statute then says that under certain circumstances, the term "*also means* any outer container or wrapping used in the retail display of any such substance." *Id.* (emphasis added). This second definition does not merely clarify the initial definition. Instead, the phrase "also means" separates the two definitions—sealing off the "immediate container" category from the "outer container" category—and signals that the latter is its own freestanding class.

A further example is even more illuminating. In 12 U.S.C. § 1715z-1(i)(4), the term "elderly families" is defined for purposes of eligibility for housing assistance. The statute first defines the term to "mean[] families which consist of two or more persons the head of which . . . is sixty-two years of age or over

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[2] For all other occurrences of the phrase, see 7 U.S.C. § 2031(j)(3); 12 U.S.C. §§ 1141j(a), 1715z-1(i)(4); *id.* § 1715z-1(s)(2)(D)(iv) (twice); 15 U.S.C. §§ 78c(a)(3)(A), 1471(3), 6809(9), 7006(1); 16 U.S.C. §§ 1532(15), 3371(h), (j)(1); 26 U.S.C. §§ 170(c), 316(b)(2)(A), (b)(3), 401(c)(3), 507(d)(2)(A), 512(a)(3)(B), 581, 1250(b)(4), 4958(c)(3)(C)(i), 7503; 31 U.S.C. § 6501(4)(B); 38 U.S.C. § 3452(b) (twice); 42 U.S.C. §§ 1437a(c)(2), 1471(b)(3); *id.* § 1485(e)(1) (twice); *id.* §§ 6372(2), 8259(6); and 46 U.S.C. § 31301(6)(B).

or is handicapped." *Id.* It then continues, "Such term *also means* a single person who is sixty-two years of age or over or is handicapped." *Id.* (emphasis added).

If "also means" simply signaled a clarification that a particular entity is included in a previous definition, Congress would have had no need to repeat "who is sixty-two years old or is handicapped" in the second part of this definition. Instead, Congress could have written just that the term "also means a single person." But because "also means" starts a new and distinct definition, it was necessary for Congress to repeat every element of the definition it meant to apply to single persons.

There is no reason to think that Congress used the phrase "also means" in the ADEA differently from how the phrase is used throughout the rest of the U.S. Code. When Congress wrote in Section 630(b) that employer "also means" political subdivisions, it supplied a new definition without carrying forward the numerosity limitation that is attached to the earlier category of employers. Just as the phrase operates elsewhere, the transition "also means" sets off a new and freestanding class, not a continuation of the initial classification.

3. The plain meaning of Section 630(b) is so apparent that when referencing the statute in the past, this Court has taken for granted that the numerosity requirement that applies to private employers does not apply to political subdivisions.

When first considering the ADEA's application to state agencies, the Court noted that the 1974 amendments "extended the substantive prohibitions of the Act to employers having at least 20 workers, *and* to the Federal and State Governments." *EEOC v.*

Wyoming, 460 U.S. 226, 233 (1983) (emphasis added). Reversing the order of the employer categories, the Court later described the 1974 amendments as "extend[ing] coverage to Federal, State, and local Governments, *and* to employers with at least 20 workers." *Johnson v. Mayor of Balt.*, 472 U.S. 353, 356 (1985) (emphasis added).

These two passages largely speak for themselves, treating the ADEA's coverage of political subdivisions as wholly independent of the numerosity requirement for private employers. Lest there be any doubt, notice that the passages in both cases lump together federal and state government employers. All agree that the ADEA covers federal employers without any numerosity requirement. *See* 29 U.S.C. § 633a; *EEOC Compliance Manual*, *supra*, § 2-III(B)(1)(a)(i) n.97 ("Federal agencies are covered under separate sections of Title VII, the ADEA, and the Rehabilitation Act, regardless of the number of employees they have."). This suggests the Court likewise has understood that the statute's coverage of states and political subdivisions lacks any numerosity requirement.

B. The structure of Section 630 reinforces that the numerosity limitation that applies to private employers does not apply to political subdivisions.

The Fire District does not dispute that the text of Section 630(b)'s political subdivision clause itself indicates that the statute's numerosity requirement does not apply to political subdivisions. Yet the Fire District argues that the broader structure of Section 630—especially its definition and treatment of "persons"—suggests that the ADEA exempts small political subdivisions. Petr. Br. 19-24. But in reality,

the structure of Section 630, just like the plain meaning of the political subdivision clause, dictates that the ADEA covers political subdivisions regardless of size.

1. Section 630 is the ADEA's definitional provision. So the place to start, to determine whether any particular type of entity is an "employer" under the ADEA, is with Section 630(b)'s comprehensive definition of that specific term. And because Section 630(b) explicitly addresses the "employer" status under the ADEA of "a political subdivision of a State," that is the end of the matter. The ADEA's separate definition of the term "person" is simply irrelevant.

Attempting to create ambiguity where none exists, the Fire District urges this Court to answer the question presented by reading Section 630(b) in a highly unnatural way. The Fire District proposes that after learning from the first sentence that an "employer" means a "person" with twenty or more employees, the Court should pause. Instead of continuing to read the next sentence, the Fire District suggests that the Court jump to Section 630(a), which defines "person." And if the Court thinks, after taking that detour, that the word "person" can be stretched to cover political subdivisions, it should then return to Section 630(b) and ask whether anything else in the statute "overrides" the implication that political subdivisions are employers only if they have twenty employees. *See* Petr. Br. 25-26.

This methodology is as misguided as it is unnatural. An example demonstrates why. Suppose a university sports arena reserves a block of seats for "special fans." A sign then explains: "The term 'special

fan' means any booster who donated at least $1000 during the past year. The term also means (1) anyone accompanying such a person and (2) faculty members."

Upon seeing this explanation, no professor would feel a need to ask what "booster" means before sitting in one of the reserved seats. This is because the sign's definition of "special fan" expressly covers "faculty." The principle is simple: When given a comprehensive definition (or other sort of explanation), one should take in the *entire* definition before seeking clarification. If part of the full definition explicitly and unequivocally answers the question, the reader need not take pains to see if some other part might indirectly address the issue.

For the same reason, professors reading the sign above would understand that they need not have donated money to the university last year to sit in a reserved seat. Even though "boosters" and faculty members might in the abstract be "overlapping rather than mutually exclusive" categories, Pet. 28, the instructions' express treatment of faculty members makes clear that the qualification pertaining to "boosters" does not apply to professors.

Turning back to the question here, the issue is whether a small political subdivision is an "employer" under the ADEA. If one reads Section 630(b) from start to finish, the statute unambiguously answers that question. Accordingly, the Court need not concern itself with the ADEA's treatment of "persons."

2. Even if the ADEA's treatment of "persons" were relevant to the question at hand, the Fire District would find no refuge there. Section 630(a) defines "person" to "mean[] one or more individuals,

partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. § 630(a). The Fire District's theory is that the final, residual phrase "any organized groups of persons" captures political subdivisions, thereby rendering the numerosity limitation that Section 630(b) attaches to "persons" applicable to such entities. *See* Petr. Br. 20-21. But this theory (a) flouts basic principles of statutory interpretation and (b) ignores the way in which Congress approached the political subdivision amendments to the ADEA.

a. It is a fundamental canon of statutory construction that "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of same enactment.'" *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)). This is "particularly" so where the two provisions "are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (alteration in original) (quoting *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam)).

This rule controls here. The word "person"—both standing alone, and as defined (somewhat circularly) as "any organized group[] of persons"—is indisputably more general than Section 630(b)'s direct and explicit reference to "political subdivision[s]." That being so, the ADEA's treatment of "persons" in the first sentence of Section 630(b) cannot blunt the rules

established for political subdivisions in the second sentence.

Besides, it is not even apparent that a political subdivision such as the Fire District falls within the general phrase "organized group of persons." For one thing, political subdivisions are not normally thought of in those terms. An entity such as a fire or water district is more readily conceived of as a geographical construct "that exists primarily to discharge some function of local government." *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009) (quoting *Political Subdivision, Black's Law Dictionary* (8th ed. 2004)). Such entities are not typically described as "organizations."[3]

Furthermore, if, as the Fire District contends, the ADEA's definition of "person" encompassed political subdivisions, then Section 630(b)'s explicit treatment of political subdivisions would be pure surplusage. It has long been "a cardinal principle of statutory construction that we must 'give effect, if possible, to

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[3] The Fire District's references to cases holding that the term "person" in other statutes "include[s] local political subdivisions," Petr. Br. 20, does not bridge this divide. All but one of those cases postdate the enactment of the ADEA—and thus tell us nothing about whatever default understanding Congress may have had in 1967 with respect to the meaning of "person." Furthermore, one of the post-enactment cases the Fire District cites, *Monell v. Department of Social Services*, 436 U.S. 658 (1978), overruled a prior decision holding that the word "person" in the statute at issue—42 U.S.C. § 1983—did *not* cover political subdivisions. *See Monroe v. Pape*, 365 U.S. 167 (1961). So if case law relating to Section 1983 were somehow relevant to divining Congress's understanding of the word "person" when it defined that term in the ADEA, it would show exactly the reverse of what the Fire District claims.

every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Yet the Fire District asks this Court to bend over backwards to construe Section 630(b)'s first sentence as rendering the second sentence redundant. This Court should decline that invitation.

b. The way in which the ADEA was amended in 1974 confirms that Congress never understood the first sentence of Section 630(b) to subsume political subdivisions. In the 1974 amendments, Congress made two changes to Section 630(b). First, it crossed out the statute's exclusion of states and political subdivisions thereof. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(3), 88 Stat. 55, 74. Second, Congress explicitly added political subdivisions as a separate category of "employer." *See id.* § 28(a)(2), 88 Stat. at 74. If Congress had believed the word "person" in Section 630(b)'s first sentence already encompassed states and political subdivisions and wanted such entities covered subject to a numerosity limitation, Congress would have stopped after the first change, leaving a perfectly unambiguous statute—one that would have covered political subdivisions as "employers" and that clearly imposed a numerosity requirement on both public and private employers. That Congress did not do so indicates that it did not think political subdivisions were "persons" and

wanted Section 630(b) to cover political subdivisions independently of its coverage of "persons."[4]

C. The statutory history of the ADEA confirms that its coverage of political subdivisions carries no numerosity requirement.

Where, such as here, a statute's text can reasonably be read only one way, the interpretive inquiry ends with the text's plain meaning. *See, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). But looking beyond Section 630(b)'s text and context to the enactment history of the ADEA confirms that the statute's coverage of political subdivisions carries no numerosity requirement.

1. In 1972, two years before Congress enacted the ADEA amendments at issue here, Congress amended Title VII to cover public employers. It did so by amending that statute's definition of "person" to include "governments, governmental agencies, [and] political subdivisions." *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 103 (amending 42 U.S.C. § 2000e(a)). With this amendment, Title VII defined (and still defines) the term "employer" as "a person"—a term that, as just mentioned, now expressly includes a state or political subdivision—that is "engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(a)-(b). This statutory language makes

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[4] The same basic reasoning applies to the ADEA's coverage of federal employers. The Fire District contends that such entities "[o]bviously" fall under Section 630(a)'s definition of person. Petr. Br. 23. But if that were so, there would have been no reason for Congress to have provided separately that the ADEA applies to federal employers. *See* 29 U.S.C. § 633a.

clear that both private and public employers are subject to Title VII only if they have the requisite number of employees.

Had Congress wished to apply the ADEA's numerosity requirement to political subdivisions, it could have simply followed this template. That is, Congress could have inserted "political subdivisions" into the ADEA's definition of "person." *See* Pet. App. 10a; *see also Case v. Bowles*, 327 U.S. 92, 98-99 (1946) (referencing a statute defining "person" to include not only any "organized group of persons" but also "political subdivisions"). But it did not. Instead, Congress left alone the ADEA's definition of "person" and amended the statute's definition of "employer" to embrace political subdivisions—separating such entities from the clause addressing "persons" with the transition "[t]he term also means." Faced with these legislative actions, this Court "must give effect to Congress' choice" to deviate from Title VII in amending the ADEA. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) (quotation omitted).

Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), cements the point. There, the Court observed that Congress had amended Title VII to authorize claims "in which an improper consideration was 'a motivating factor' for an adverse employment decision." *Id.* at 174 (quoting 42 U.S.C. § 2000e-2(m)). Yet when taking that action, "Congress [had] neglected to add such a provision to the ADEA." *Id.* The Court held that the "negative implication" of that comparison is that the ADEA does not allow mixed motive claims: "We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make

similar changes to the ADEA." *Id.*; *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-59 (1991) (employing the same reasoning to construe Title VII and ADEA differently in another respect). The same reasoning applies here.

The Fire District responds that because Congress was not drafting the ADEA "from scratch," it had no choice but to rearrange the words "political subdivision" around Section 630(b)'s extant phrase "also means." Petr. Br. 4-5; *see also id.* 4 fig.1 (imagined redline of statute). But Congress is not confined to amending a statute using only words already contained within a particular subsection; amending legislation is not a game of Scrabble or refrigerator magnet poetry. In fact, in the very amendments at issue, Congress altered many sections by adding new words and eliminating existing ones. *See, e.g.*, Fair Labor Standards Amendments § 3, 88 Stat. at 55 ("Section 6(b) is amended (1) by inserting . . . and (2) by striking out . . . ."). Consequently, this Court should assume that Congress retained the phrase "also means" in Section 630(b)'s second sentence not out of a sense of obligation but because inserting political subdivisions after that phrase best effectuated its intent—namely, to set forth an additional category of covered employers in a new, self-contained part of the definition.

2. To the extent relevant, the legislative history of the 1974 amendments to the ADEA also supports reading Section 630(b)'s reference to political subdivisions as a freestanding definition lacking any numerosity requirement. The House report regarding these amendments described the decision to extend the ADEA to cover political subdivisions as a "logical extension of the committee's decision to extend FLSA

coverage to Federal, State, and local governmental employees." H.R. Rep. No. 93-913, at 40 (1974). Those amendments expanded the FLSA's coverage to apply to all political subdivisions regardless of size. *See* Fair Labor Standards Amendments § 6(a)(1)-(2), 88 Stat. at 58-59 (amending 29 U.S.C. § 203(d)-(e)).[5] The only "logical extension" of that decision would have been to do the same under the ADEA.

The Special Committee on Aging's contemporaneous report reinforces that the 1974 amendments were meant to withhold any numerosity requirement from political subdivisions. The Committee explained that the 1974 FLSA amendments included "major improvements for the Age Discrimination in Employment Act: (1) Extension of coverage to Federal, State, and local governmental employees" and "(2) A broadening of the application of the Act to include private employers with 20 or more employees (instead of 25 as under prior law)." S. Spec. Comm. on Aging, 94th Cong., *Action on Aging Legislation in 93d Cong.* 9 (Comm. Print 1975).

Like the Seventh Circuit in *Kelly v. Wacuconda Park District*, 801 F.2d 269 (7th Cir. 1986), the Fire District fastens onto a couple of floor statements by Senator Bentsen that it says point in the other direction. *See* Petr. Br. 45-46. But this Court has recently (and repeatedly) made clear that "floor

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[5] The Fire District claims that Congress "single[d] out" small fire and police departments to be "exempt from the Fair Labor Standards Act." Petr. Br. 55 n.14. Not so. Such employers are not exempt from the FLSA's minimum wage requirements or the statute's coverage generally. Rather, fire and police departments with fewer than five employees are exempt only from the FLSA's maximum hour rules. *See* 29 U.S.C. §§ 207, 213(b)(20).

statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017). They certainly cannot be used "to muddy clear statutory language." *Id.* (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011)).

Senator Bentsen's remarks scarcely support the Fire District's position anyway. Those statements posited that public and private sector employees should have "the same protections" against age discrimination. *See* Petr. Br. 45-46 (quoting 120 Cong. Rec. 8768 (1974)); *id.* 45 (quoting 118 Cong. Rec. 15,895 (1972)). By "same protections," Senator Bentsen simply meant the same substantive guarantee against age discrimination. As the Ninth Circuit recognized, there is no evidence that his statements evinced an intent—much less a Congress-wide intent—to limit the ADEA's coverage of public entities by imposing a numerosity requirement. *See* Pet. App. 15a-16a.

D. The EEOC has long interpreted the statute to apply to political subdivisions regardless of size.

If any ambiguity remained as to whether the ADEA covers all political subdivisions, the solution would be to endorse the EEOC's long-standing view that the statute covers political subdivisions regardless of size. The EEOC's "policy statements, embodied in its compliance manual and internal directives" reflect a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)). Such statements, therefore,

"are entitled to a 'measure of respect'" from the judiciary—that is, they are entitled to *Skidmore* deference. *Id.* (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004)); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). This is particularly so where, as here, "the agency has applied its position with consistency." *Holowecki*, 552 U.S. at 399; *see also United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

The EEOC's compliance manual is clear: "A state or local government employer is covered under the ADEA regardless of its number of employees." *EEOC Compliance Manual*, *supra*, § 2-III(B)(1)(a)(i). Moreover, the EEOC's position on the issue dates back to at least the mid-1980s. *See Kelly*, 801 F.2d at 270 n.1. If this Court harbors any doubt concerning the ADEA's coverage of political subdivisions, it should defer to the agency's "reasonable" interpretation of Section 630(b). *See Holowecki*, 552 U.S. at 401-02.

II. Reading the ADEA to cover political subdivisions regardless of size generates no legal or practical problems.

Urging this Court to "depart from [the] standard dictionary definition" of "also means," *see* Petr. Br. 33—as well as the structural and contextual indicators that Congress meant what it said in the ADEA—the Fire District advances several consequentialist arguments. Applying the ADEA to small political subdivisions, the District contends, creates various legal anomalies, raises constitutional difficulties, and threatens the very "survival" of such entities, Petr. Br. 17. These arguments are incorrect and overblown.

A. The ADEA's coverage of public employers creates no anomaly compared to other antidiscrimination laws.

The Fire District argues that because "[t]he ADEA is part of a trio" of federal statutes prohibiting employment discrimination, it creates an anomaly for the ADEA, but not Title VII or the ADA, to cover public employers regardless of size. *See* Petr. Br. 44, 46-49. But there is no canon of construction requiring statutes with comparable goals to operate in exactly the same way. To the contrary, this Court has repeatedly instructed—including in the precise context of comparing the ADEA and Title VII—that one "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008). Conducting such an examination here reveals that if the ADEA should track any other statute with respect to its coverage of political subdivisions, it should be the FLSA, not Title VII or the ADA.

1. The Fire District is correct that the ADEA's "substantive, antidiscrimination provisions" are modeled after Title VII. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). But in other ways, the ADEA incorporates labor law instead of civil rights rules. In fact, the ADEA grew out of reports and recommendations from the Secretary of Labor. *See EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). The Secretary explained that age-based limitations in employment were "rarely . . . based on the sort of animus motivating some other forms of discrimination," but they "deprived the national economy of the productive labor of millions of

individuals and imposed on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits." *Id.* at 231.

In keeping with its objective of giving older workers "the opportunity to engage in productive and satisfying occupations," *Wyoming*, 460 U.S. at 231, the ADEA directly incorporates the "powers, remedies, and procedures" of the FLSA, 29 U.S.C. § 626(b). Put colloquially, while the *what* of the ADEA is related to Title VII, the ADEA's *who*, *when*, and *how*—i.e., the definitions, mechanisms, and remedies of the statute—are drawn from the FLSA. And, as noted above, the FLSA applies to political subdivisions regardless of size. *See* 29 U.S.C. § 203(d)-(e). It should not be surprising, therefore, that the ADEA does the same.

Citing *Lorillard v. Pons*, 434 U.S. 575 (1978), the Fire District insists that this Court has often looked to Title VII "to determine how the [ADEA] should function." Petr. Br. 44. But *Lorillard* actually cuts in the opposite direction. There, an employer maintained that because Title VII did not provide for jury trials, the ADEA should not do so either. *See* 434 U.S. at 583-84. In a unanimous opinion by Justice Marshall, the Court found the employer's "argument by analogy to Title VII unavailing." *Id.* at 584. Because the ADEA "incorporates fully the remedies and procedures of the FLSA," Title VII "sheds *no light* on congressional intent under the ADEA." *Id.* at 582, 585 (emphasis added). When it comes to matters other than the ADEA's substantive prohibitions, the FLSA is the instructive comparator. *See id.* at 580-85.

So too here. Section 630's coverage of political subdivisions parallels the definitional provisions of the FLSA. Both statutes first (and almost identically) define "person." They then use the term "person" to help define "employer." *Compare* 29 U.S.C. § 203(a), (d) (FLSA), *with id.* § 630(a)-(b) (ADEA). And it is in the definition of "employer"—and not "person"—that both statutes extend coverage to public entities. This similarity is by design. "The fact that Congress amended the ADEA itself in the same 1974 Act [that amended the FLSA] makes it more than clear that Congress understood the consequences of its actions." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000).

2. Even if one were to look beyond the FLSA for guidance regarding the ADEA's coverage of political subdivisions, there would still be better comparators than Title VII and the ADA.

Start with the ADEA's own treatment of federal employers. The ADEA covers federal agencies irrespective of size. *See* 29 U.S.C. § 633a; *EEOC Compliance Manual*, *supra*, § 2-III(B)(1)(a)(i) n.97. If Congress thought one set of public employees should enjoy the protections of the ADEA regardless of the size of their employers, it makes sense for Congress to have thought the same with respect to the other set of such employees.

Furthermore, "almost every State of the Union" prohibits age discrimination in employment as a matter of state law. *Kimel*, 528 U.S. at 91. A majority of those laws cover political subdivisions regardless of size, even though many also apply numerosity

limitations to private employers.[6] It is hardly anomalous for Congress to have made the same decision in the ADEA.

3. Even comparisons between the ADEA and Title VII fail to support the Fire District's position. When addressing arguments that the ADEA should track Title VII, the Court has stressed that analysis "must focus on the text" of each statute. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). And where, as here, the statutory texts are "materially different," they must be construed differently. *Id.* at 173.

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[6] Fifteen states have a numerosity requirement for private employers but *not* for public employers. *See* Cal. Gov't Code §§ 12926(d), 12940(a); Del. Code tit. 19, §§ 710(7), 711; Idaho Code §§ 67-5902(6), -5909; 775 Ill. Comp. Stat. 5/1-102(A), /2-101(B)(1), /2-102(A); Kan. Stat. §§ 44-1112(d), -1113; Mo. Rev. Stat. §§ 213.010(8), .055(1)-(2); Neb. Rev. Stat. §§ 48-1002(2), -1004; Ohio Rev. Code §§ 4112.01(A)(2), .14; 43 Pa. Stat. and Cons. Stat. §§ 954(b), 955; 28 R.I. Gen. Laws §§ 28-5-6(8)(i), -7; Tenn. Code §§ 4-21-102(5), -401(a); Tex. Lab. Code §§ 21.002(8), .051; Utah Code §§ 34A-5-102(i), -106; W. Va. Code §§ 5-11-3(d), -9; Wyo. Stat. §§ 27-9-102(b), -105. Fourteen additional states and the District of Columbia have no numerosity requirement for any kind of employer. *See* Alaska Stat. §§ 18.80.220(a), .300(5); Colo. Rev. Stat. §§ 24-34-401(3), -402; D.C. Code §§ 2-1401.02(10), (21), 2-1402.11; Haw. Rev. Stat. §§ 378-1 to -2; Me. Stat. tit. 5, §§ 4553(4), (7), 4572(1); Mich. Comp. Laws §§ 37.2103(g), .2201(a), .2202; Minn. Stat. §§ 363A.03(16), (30), 363A.08; Mont. Code §§ 49-2-101(11), -303; N.J. Stat. §§ 10:5-5(e); -12; N.D. Cent. Code §§ 14-02.4-02(8), (13), 14-02.4-03; Okla. Stat. tit. 25, §§ 1301(1), 1302; Or. Rev. Stat. §§ 30.260(4)(a), 174.109, 659A.001(4), (9)(b), 659A.030; Vt. Stat. tit. 21, §§ 495, 495d(1); Wash. Rev. Code § 49.44.090, *construed in Bennett v. Hardy*, 784 P.2d 1258, 1260 (Wash. 1990); Wis. Stat. §§ 111.32(6), .321-.322. One final state, Arkansas, prohibits only public employers from discriminating on the basis of age, and the law contains no numerosity requirement. *See* Ark. Code §§ 21-3-201, -203.

The Fire District responds that if a discrepancy were to exist between Title VII and the ADEA, "one would expect" a statute prohibiting race, religious, national origin, and sex discrimination to apply more broadly than one prohibiting age discrimination. *See* Petr. Br. 48. But surprisingly or not, it is beyond dispute that Congress cast a wider net with respect to the ADEA when it originally provided that it, but not Title VII, applied overseas. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256, 258-59 (1991). Congress acted similarly here.

Perhaps legislators in 1974 thought "that government should be a model of non-discrimination" on the basis of age. *See* Pet. App. 16a n.10. Or perhaps Congress determined, when amending the ADEA to cover political subdivisions, that there was a greater need for the statute to apply comprehensively. The Equal Protection Clause deems "an age classification [to be] presumptively rational," so public employees who suffer disparate treatment based on age have no federal law other than the ADEA to which they can realistically turn for relief. *See Kimel*, 528 U.S. at 83-88. By contrast, Title VII is only one of a broad array of federal laws that combat race and sex discrimination. The Equal Protection Clause requires exacting scrutiny to be applied to any public employment decision based on race or sex. *See Pers. Adm'r v. Feeney*, 442 U.S. 256, 272-73 (1979). And 42 U.S.C. §§ 1981 and 1983 similarly prohibit public employers—of any size—from discriminating on the basis of race. *See Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 730-31 (1989) (plurality opinion); *Burnett v. Grattan*, 468 U.S. 42, 50 (1984); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Consequently, employees of political subdivisions such

as the Fire District need not depend on Title VII's protections in the same way they must rely on the ADEA's.

Even if it were anomalous for the ADEA, but not Title VII, to cover small political subdivisions, it still would not matter. "[A]nomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014). Such is the legislature's prerogative. Accordingly, "[t]his Court does not revise legislation . . . just because the text as written creates an apparent anomaly." *Id.*

B. Section 630(b) creates no problem with respect to the ADEA's coverage of agents.

The Fire District next contends that the Court must set aside the plain meaning of Section 630(b)'s political subdivision clause because it is "flatly incompatible with the agent clause." Petr. Br. 27. Specifically, the Fire District insists that reading the statute to cover small political subdivisions creates two problems with respect to the ADEA's application to agents: (1) it subjects individual employees of private employers to personal liability, *see id.* 28-30; and (2) it eliminates respondeat superior liability for public employers, *see id.* 50-51. But, in reality, the statute does not necessarily give rise to either of these things. If anything, it is the Fire District's reading of the statute—under which the agent clause would serve only to reiterate that employers are subject to respondeat superior—that should give this Court pause.

1. The Fire District is right about one thing: "If the phrase 'also means' [in Section 630(b)] adds a category of employer not covered by the first sentence," then "agents" of covered private employers constitute an additional category of "employer." Petr. Br. 28. But it hardly follows that supervisors and other individual employees may be held individually liable for violating the ADEA.

As this Court has recognized regarding Title VII's identically worded agent clause, the clause covers a category of employers wholly distinct from individual employees. Specifically, the clause covers third-party independent contractors, preventing employers from "delegating discriminatory programs to corporate shells." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 718 n.33 (1978). Thus, as numerous courts of appeals and the EEOC have recognized, "[w]here the employer has delegated control of some of the employer's traditional rights, such as hiring or firing, to a third party, the third party has been found to be an 'employer' by virtue of the agency relationship." *Williams v. City of Montgomery*, 742 F.2d 586, 589 (11th Cir. 1984) (quoting Barbara Lindemann Schlei & Paul Grossman, *Employment Discrimination Law* 1002 (2d ed. 1983)); *see Morgan v. Safeway Stores, Inc.*, 884 F.2d 1211, 1214-15 (9th Cir. 1989); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated mem. on other grounds*, 463 U.S. 1223 (1983); *see also EEOC Compliance Manual*, *supra*, § 2-III(B)(2)(b) ("An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity.").

Recognizing that Section 630(b)'s agent clause sweeps in third-party entities that would not otherwise be included in the statute's definition of "employer" is enough to give independent meaning to the clause. Accordingly, this Court need not decide here whether individual employees—such as supervisors or human resource managers—are *also* swept in by the agent clause. The Court could decide in the future that the clause does not apply to individual employees, or it could hold that the clause allows at least some individuals to be held personally liable for violating the ADEA.[7]

2. The Fire District is also wrong to assume that Section 630(b)'s reference to private agents as a separate category of employer—coupled with the absence of any such reference to public employer agents—"eliminate[s] respondeat superior liability" for public employers' age discrimination. Petr. Br. 50. The Fire District's assumption proceeds from the premise that the agent clause provides the only possible "basis for imposing respondeat superior

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[7] If this Court were to reach the latter conclusion, it would not, as the Fire District claims, be "unprecedented." Petr. Br. 28. Some district courts have held that the ADEA imposes individual liability. *See, e.g.*, *Weeks v. Maine*, 871 F. Supp. 515, 517 (D. Me. 1994). In addition, the FLSA—which, like the ADEA, subjects any employer who violates the Act to liability, *see* 29 U.S.C. § 216—imposes personal liability on employees who "independently exercised control over the work situation." *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 195 (5th Cir. 1983) (citing cases from several circuits); *see also* Daniel B. Abrahams et al., *Public Employer's Guide to FLSA Employee Classification* ¶ 730 (2015). The consensus among the courts of appeals is that the Family and Medical Leave Act (FMLA) does so as well. *See Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422 (2d Cir. 2016) (citing cases from several circuits).

liability" on employers. *See id.* But that premise is incorrect.

A lawsuit for discrimination "is, in effect, a tort action." *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 264-65 (1989) (O'Connor, J., concurring in the judgment). And "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer*, 537 U.S. at 285; *see also id.* (collecting similar authority with respect to other types of causes of action); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

"It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer*, 537 U.S. at 285; *see also id.* (the Fair Housing Act incorporates such liability even though text of the statute "says nothing about vicarious liability"); *Balt. & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 330 (1883) (principle that corporations "are equally responsible for injuries done in the course of their business by their servants" is "so well settled as not to require the citation of any authorities in its support"). Accordingly, the very "prohibition against discrimination by an 'employer' . . . necessarily embodies respondeat superior principles on its own." *Ball v. Renner*, 54 F.3d 664, 667 (10th Cir. 1995). That is, the ADEA inherently renders public employers—like private employers—subject to respondeat superior liability, irrespective of any agent clause.

3. If anything, it is the Fire District's reading of Section 630(b) that gives rise to problems with respect to the statute's agent clause.

For starters, the Fire District's proposed construction of the agent clause renders it superfluous. As just discussed, well-established legal principles ensure—regardless of any explicit reference to "agents"—that a covered employer can be held liable under the ADEA for the discriminatory acts of its supervisory employees. It is hardly necessary for the agent clause to "clarify[]," Petr. Br. 30, what is already built into the statute.

Citing cases involving 42 U.S.C. § 1983 and Title IX, the Fire District maintains that without the agent clause, Section 630(b) could have "be[en] read to exclude" respondeat superior liability. Petr. Br. 31. But the Court's interpretations of Section 1983 and Title IX do not cast light on whether the ADEA's agent clause is necessary to establish respondeat superior liability. Section 1983 imposes liability on "persons," not employers. *See* 42 U.S.C. § 1983. It is therefore unsurprising that respondeat superior is not incorporated into the statute. Title IX, meanwhile, does not even contain an express cause of action; instead, the Court has recognized an implied right of action. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). In that situation, the canon that Congress creates causes of action against the backdrop of the common law does not govern. *See id.* at 284-85.

Second, recall that the Fire District's basic contention is that the "also means" sentence—which includes the agent clause—merely "clarifies which . . . entities are included in the definition of 'employer' in § 630(b)'s first sentence, without separately

delineating additional categories of employers." Petr. Br. 15. If that were correct, then the ADEA would allow employers an end run around the statute "by delegating discriminatory programs to corporate shells," *Manhart*, 435 U.S. at 718 n.33. Workers who are subjected to discrimination by such third-party entities—for example, a company hired to perform layoffs—would not be able to sue their employers, for respondeat superior does not generally reach the conduct of independent agents. *See* Restatement (Second) of Torts § 409 (1965). And such workers could not sue the third-party entities, for they would not be "employers" under the Fire District's limited construction of the ADEA's agent clause.

C. Section 630(b) raises no constitutional concerns.

The Fire District next argues that reading the ADEA to cover political subdivisions regardless of size would tread on state sovereignty and overstep Congress's power to regulate commerce. Petr. Br. 36-37. Neither constitutional principle is implicated here.

1. The rule that federal statutes should not be construed, absent a clear statement, to intrude on state sovereignty does not apply where the statute is "unambiguous"—that is, where the statute's meaning is "plain to anyone reading [it]." *Salinas v. United States*, 522 U.S. 52, 60 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991)). For that reason alone, the clear statement rule does not apply here.

Even if Section 630(b) were ambiguous, the result would be no different. The clear statement rule applies only when federal law "implicate[s] 'a decision of the most fundamental sort for a sovereign entity.'" *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5

(1995) (quoting *Gregory*, 501 U.S. at 460). Such is not the case here. By the Fire District's telling, Section 630(b) "overrides state judgments as to what sized agencies and political subdivisions can tolerate the burdens of age-discrimination litigation." Petr. Br. 38. But this Court has already held that federal laws restricting "a State's authority to set the conditions upon which its political subdivisions are subject to suit" do not trigger the clear statement rule. *Jinks v. Richland County*, 538 U.S. 456, 466 (2003).

Nor does preventing states themselves from discriminating based on age "portend[] any[] . . . profound threat to the structure of state governance." *Wyoming*, 460 U.S. at 240. In *Wyoming*, this Court determined that the extension of the ADEA to cover state and local governments did not tread on states' sovereignty or their Tenth Amendment immunity, even under the more state-friendly regime of *National League of Cities v. Usery*, 426 U.S. 833 (1976), that was later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *See Wyoming*, 460 U.S. at 239-42.

2. Treating small political subdivisions as employers under the ADEA does not test the bounds of Congress's Commerce Clause powers.

This Court has made clear that Congress may regulate economic activity under the Commerce Clause whenever such activity "substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 560 (1995); *see also United States v. Morrison*, 529 U.S. 598, 610 (2000). Employment is quintessential economic activity. And when "viewed in the aggregate," *Lopez*, 514 U.S. at 561, the

employment activity covered by the ADEA substantially affects interstate commerce.

Lest there be any doubt, the FLSA covers public employers regardless of size, *see* 29 U.S.C. § 203(d)-(e), and it expressly provides that all such entities are "engaged in commerce," *see id.* § 203(s)(1)(C). This Court has recognized that these dictates "undoubtedly [fall] within the scope of the Commerce Clause." *See Nat'l League of Cities*, 426 U.S. at 841-42.

The Fire District points out that Section 630(b) characterizes the private employers it covers as "engaged in an industry affecting commerce." Petr. Br. 40 (quoting 29 U.S.C. § 630(b)). Yet the Fire District cites no case holding that this qualifier is necessary to sustain the ADEA. Congress probably inserted the "affecting commerce" phrase to make clear it was "invok[ing] the full breadth of its Commerce Clause authority to achieve [its] end." *See Carr v. United States*, 560 U.S. 438, 454 (2010); *see also Pol. Nat'l All. v. NLRB*, 322 U.S. 643, 647-48 (1944). But whatever the reason, a plain reading of Section 630(b)'s political subdivision clause does not raise any constitutional concerns.[8]

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[8] This is not the only occasion on which Congress has applied an "affecting commerce" element to private, but not public, employers. The FMLA covers employers "in any industry or activity affecting commerce." 29 U.S.C. § 2611(4)(A)(i). But for the purposes of the provision including public agencies within the FMLA's definition of employer, "a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce." *Id.* § 2611(4)(B); *see also Haybarger v. Lawrence County Adult Prob. & Parole*, 667 F.3d 408, 416-17 (3d Cir. 2012); *Modica v. Taylor*, 465 F.3d 174, 185-86 (5th Cir. 2006).

D. Section 630(b) does not threaten to disrupt the operations of political subdivisions.

Finally, the Fire District asks this Court to disregard the plain meaning of Section 630(b) because it portends "devastating effects" on political subdivisions. Petr. Br. 17. This contention is overwrought.

1. If, as the Fire District contends, applying bans on age discrimination to small political subdivisions would "threaten the[ir] survival," Petr. Br. 54, one would expect states themselves to refrain from doing so. Yet "almost every State of the Union" requires political subdivisions to pay "money damages" if they discriminate on the basis of age. *Kimel*, 528 U.S. at 91. Thirty states—including several, such as Alaska and Wyoming, that are "rural and sparsely populated," Petr. Br. 55—have such laws covering all political subdivisions, regardless of size. *See supra* at 29 n.6. And several other states have numerosity requirements in the single digits for such entities. *See* Petr. Br. 39 (citing statutes from numerous states); Iowa Code § 216.6(1)(a), (6)(a).

The Fire District identifies no adverse consequences of those statutes. There is no good reason to think, therefore, that reading the ADEA's definition of employer according to its plain terms would suddenly kill off small political subdivisions.

2. At any rate, there are numerous ways in which political subdivisions limit litigation costs. For one thing, many small political subdivisions are integrated with larger subdivisions that ultimately pay any litigation bills or judgments. Take, for instance, *Cink v. Grant County*, 635 Fed. Appx. 470 (10th Cir. 2015), a case the Fire District cites favorably, *see* Petr.

Br. 9, 25. In that case, the Tenth Circuit held that an employee of a sheriff's department with fewer than twenty employees could bring an ADEA lawsuit against the county because the former was a subordinate department of the latter. 635 Fed. Appx. at 474-76. The sheriff's department did not need to pay a penny.

What is more, the vast majority of public employers participate in insurance pools that cover discrimination lawsuits. *See, e.g.*, Karen Nixon, Pub. Agency Risk Sharing Auth. of Cal., *Public Entity Pooling—Built to Last* 3 (2011), http://www.cajpa. org/documents/Public-Entity-Pooling-Built-to-Last.pdf (noting that 85% of counties, townships, municipalities, school districts, and special districts nationwide participate in risk pools). The Fire District responds that "insurance does not make new legal expenses disappear; it simply packages them as premiums" that are sure to "spike" if the ADEA applies here. Pet. Reply 11. But insurance pools cover all manner of state and federal claims, including "general liability, professional liability, auto liability, property, and workers compensation." Marcos Antonio Mendoza, *Reinsurance as Governance: Governmental Risk Management Pools as a Case Study in the Governance Role Played by Reinsurance Institutions*, 21 Conn. Ins. L.J. 53, 56 (2014). The notion that the ADEA coverage alone could somehow dramatically affect the calculus of these insurance pools seems rather farfetched.

* * *

For all the Fire District's argumentation, it is important not to lose sight of what it actually seeks here—a free pass under federal law to discriminate on

the basis of age. No matter how blatant or unjustified its reliance on age, the Fire District seeks immunity for "inflict[ing] on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations," *Wyoming*, 460 U.S. at 231. Even if the Fire District were right that reading the ADEA according to its plain meaning will put more pressure on political subdivisions to refrain from engaging in such conduct, that would be a *good* thing. Eliminating age discrimination from the American workplace is exactly what the ADEA is designed to do.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

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No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

While claiming that their reading flows from statutory text, Respondents sure take a lot of liberties.

There are the elisions. Respondents urge the Court not to "concern itself" with the word "person" in § 630(b)'s person-based definition of "employer." Respondents resist the attention to "person" because they cannot deny the word traditionally encompasses political subdivisions, thus subjecting such entities to the employee minimum. Then, Respondents elide the agent clause smack in the middle of the text they are reading. They have no choice, because they can offer no reading of the word "agent" in that clause that is remotely plausible.

Which brings us to the distortions. Most notably, Respondents propose the word "agent" in the critical second sentence of § 630(b) might possibly mean "independent contractor." Never mind that the two are not synonyms, and are often contradictory. Never mind that no court (or dictionary) has ever adopted that definition. Respondents have to offer this Court some way to avoid a result they tacitly concede would be as disastrous as it is preposterous: Under their reading, any employee who makes or implements personnel decisions is personally liable as an employer, subjecting her to independent liability.

Then there are the contradictions and anomalies. Respondents do not deny that their reading places public and private entities on unequal footing, and places the ADEA out of step with its sister antidiscrimination statutes, Title VII and the Americans

with Disabilities Act (ADA). But Congress expressed its intention to bring accord on both dimensions. And Respondents offer no plausible explanation of why Congress would have singled out the ADEA as the only discrimination statute (not to mention the Fair Labor Standards Act (FLSA)) to treat political subdivisions more harshly than private enterprises.

When a party needs to contort that much to support its statutory construction, something must be wrong. Here, what is wrong is the failure to heed this Court's admonition that "[s]tatutory language cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quotation marks omitted). The only reading that is faithful to the statutory text—all of it—and context is that political subdivisions are subject to the ADEA's employee minimum.

ARGUMENT

I. The ADEA's Text, Context, And Statutory History Establish That § 630(b)'s 20-Employee Minimum Exempts Small Political Subdivisions.

Respondents recognize that the essential "inquiry" in this case is how the second sentence of § 630(b) relates to the first: Does it "*add* a new category" of employers or "merely *clarify*" the preceding definition? RB10.[1] But rather than taking the most straightforward path through the relevant language, Respondents plot a course that looks like Pac-Man

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[1] We abbreviate Brief for Petitioner "OB," Brief for Respondents "RB," and Brief for the United States "GB."

running from ghosts: Start at the word "means" in the first sentence, but then avoid the rest of that sentence until you get to "also means" in the second, RB9-12; slip around the agent clause in the second sentence, and proceed to the governmental clause there, RB13-14; then swing back around to the defined term "person" in the first sentence, RB15-20, meander for a while, and only then turn back towards the elided agent clause to check it off the list, RB31-36.

We will stick with the direct route. We construe the words of the statute in the order in which they appear, §§ A-B, and then address additional interpretive principles that favor our reading, § C. As explained in the opening brief (at § I), the text, context, and statutory history, in addition to other interpretive principles, establish that the employee minimum applies to political subdivisions.

A. Section 630(b)'s first sentence defines "employer" expansively to include political subdivisions, but only those with at least 20 employees.

Respondents do not contest that § 630(b)'s first sentence is the baseline definition of "employer" to which the subsequent governmental clause relates. But they dispute the natural legal conclusion: that the first sentence is therefore vital "context" in which the governmental clause must be "placed." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). They also question our takeaway from the first sentence: that it embraces political subdivisions through the word "person," so that the baseline definition of "employer" encompasses only those political

subdivisions that have at least 20 employees and affect commerce.

1. Respondents' first rejoinder is unconventional at best: They urge this Court to ignore the term "person" in § 630(b)'s first sentence entirely. They deride any consideration of the statutory definition in § 630(a) as "highly unnatural." RB15. In their view, if you ignore the definition of "person" and skip to the governmental clause, you learn everything you need to know about governmental entities—including, Respondents say, that there is no employee minimum. RB10-15.

Referencing a statutory definition is not "unnatural," RB15—it is mandatory. This Court routinely pauses on defined terms to plug in their definitions, just as we have done here, before interpreting the remainder of the text. *See, e.g.*, *Quern v. Mandley*, 436 U.S. 725, 742-43 (1978). To do otherwise is to impermissibly construe "isolated provisions" instead of "statutes." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010).

Respondents cannot justify their disregard of the word "person" with their stylized hypothetical about "special fans," "boosters," and "faculty." RB15-16. Like the Ninth Circuit's hypotheticals about numbers and banks, *see* Pet. 27-29, theirs merely shows that there are contexts where the words "also means" would obviously be additive. Stylize a different hypothetical and context points in the other direction. Suppose a ticket at Respondents' stadium promises

"Admission to the College Club for University-Affiliated Ticketholders," and the fine print says: "The term 'University-Affiliated Ticketholder' means any person with a University ID. It also means faculty, but does not mean staff." It doesn't take a quantum physics professor to figure out that faculty are covered "persons" required to show ID.

Is that a peculiar hypothetical? Of course—so are Respondents' and the Ninth Circuit's. And § 630(b) is a peculiarly drafted statute. But that is all the more reason to follow tried-and-true interpretive methodologies, considering each word in its context. And for the governmental clause, the first sentence—and particularly, the word "person"—provides critical context.

2. So do Respondents think a political subdivision is a "person" within the meaning of the first sentence or not? They won't say. We explained that the answer must be yes for two independent reasons, OB20-21, which Respondents fail to refute.

First, this Court has construed the term "person" to encompass political subdivisions in a wide range of statutes, even when undefined. To this, Respondents offer only the below-the-line suggestion (RB18 n.3) that this Court could ignore most of those cases because they postdate the ADEA. That is not how it works. All but one of the *statutes* this Court was interpreting in those cases predate the ADEA. So the cases construing the word "person" in those statutes confirm that Congress has used it to embrace political subdivisions for a century.

Second, the expansive definition of "person" in § 630(a) compels the same result here. Respondents offer that political subdivisions are "more readily conceived" in other terms, like "geographical construct." RB18. The same could have been said about the term "person" in other statutes. It did not move the result there, and it certainly doesn't here, where the definition's catchall broadly refers to "*any* organized groups of persons." Respondents do not dispute our point (OB21) that this Court gives "the word 'any' ... an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). That would include *all* organized groups of persons—even those "readily conceived" in alternative language. Respondents also ignore that "person" includes "corporations" and "associations," eliminating any doubt that the scope of t[illegible] catchall reaches political subdivisions. OB21-22.

Similarly, Respondents do not deny another direct textual point: If "person" did not include public entities, there would have been no reason to exclude federal entities from the person-based definition of "employer"—and no reason to exclude state and local entities from the original version. OB22-24.

3. Respondents combine with the Government to present a pu-pu platter of canons that they contend undermine the text. It underwhelms.

First, Respondents attempt to narrow § 630(b)'s first sentence by invoking the canon that specific provisions supersede general ones. RB17-18; *see* GB16. They say that "[t]he word 'person' ... is indisputably more general than ... 'political subdivisions.'" RB17.

This, Respondents argue, requires a narrow construction of the word "person," so as not to "blunt the rules established for political subdivisions" in the second sentence. RB17-18. But that begs the question. The argument assumes that the second sentence adds political subdivisions as a separate category and creates different "rules" for them. If, as we maintain, the second sentence clarifies what is already contained in the first sentence, there is no conflict to resolve, and thus no need for the specific-general canon.

Further, even *accepting* Respondents' unwarranted assumption, the coverage of certain political subdivisions under § 630(b)'s first sentence would not "blunt" the governmental clause. The governmental clause would simply extend the baseline coverage of public entities established by § 630(b)'s first sentence. There is no contradiction.

Second, the Government (but not Respondents) argues that the *noscitur a sociis* canon restricts § 630(a)'s catchall provision to the private sphere because it "appears at the end of a list of private entities." GB16. Not so. This Court (and dictionaries) consistently defines two terms in § 630(a)'s list, "corporations" and "associations," to include public entities. OB21-22.

Third, the Government (but not Respondents) notes that "[t]he term 'person' presumptively excludes States or state instrumentalities." GB16 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000)). That presumption "may be disregarded" upon "some affirmative showing of statutory intent to the contrary." *Stevens*, 529 U.S. at

781. There are several such showings here. Foremost is the capacious text of § 630(a), including its catchall and reference to "corporations" and "associations." This Court considered a similar statutory definition in *Georgia v. Evans* and concluded that it embraced States, overcoming any contrary presumption. 316 U.S. 159, 162-63 (1942). And § 630(b)'s statutory history confirms that Congress understood "person" to include States and subdivisions from the start: That is why it felt the need to exclude both explicitly from coverage. *See Stevens*, 529 U.S. at 783 n.12 (considering statutory history).

In the end, all these arguments about background presumptions and potential ambiguities only prove our central thesis: When Congress drafted this statute, there were grounds for uncertainty. Congress needed to be crystal clear about which governmental entities are included as employers, and which are not—hence a clarifying clause. This fully answers Respondents and the Government's final resort to the canon against superfluity. Respondents argue that if "the ADEA's definition of 'person' encompassed political subdivisions, then Section 630(b)'s explicit treatment of political subdivisions would be pure surplusage." RB18; *see* GB17. On the contrary, as we have explained (OB33), it operates as a crucial this-but-not-that clause, avoiding any doubt as to precisely which governmental entities § 630(b)'s capacious, person-based definition includes. As the Government elsewhere concedes, "remov[ing] any doubt" in this way is a meaningful, non-redundant statutory function. GB17 (citing *Ali*, 552 U.S. at 226).

4. Finally, Respondents note that when Congress added coverage for political subdivisions to Title VII in 1972, it explicitly placed them in the definition of the word "person." Respondents argue that because Congress did not do it that way in the ADEA, it must have meant to omit political subdivisions from the definition. RB20-21. We have already explained that "Title VII started with a narrower definition of 'person' than the ADEA," so "it is only natural that [the two statutes] took a different route to the same place," OB52-53. To borrow Respondents' phrase, Congress was not "confined" to amending the ADEA "using only words" previously chosen for Title VII. RB22.

B. The second sentence clarifies what is included in the first sentence's definition, without adding new categories of employers.

1. We now turn to the text and structure of § 630(b)'s second sentence to determine its relationship to the first. We start with an important clarification. Respondents incorrectly assert that "[t]he Fire District does not dispute that the text of Section 630(b)'s political subdivision clause itself indicates that the statute's numerosity requirement does not apply to political subdivisions." RB14. We most certainly do. As Respondents elsewhere acknowledge (RB10-11 & n.1), we invoked none other than the Oxford English Dictionary to demonstrate that the critical phrase —"also means"—can signal "clarification, rather than addition"; it can mean "includes" or "incorporates." OB18. Respondents nowhere dispute

that the phrase *can* bear that meaning, which makes the sentence (standing alone) ambiguous.[2]

One key to discerning which meaning applies is a point Respondents concede. Section 630(b)'s second sentence contains the agent clause and the governmental clause. Both clauses are introduced by the same transitional phrase, "also means." And Respondents agree (RB32) that however the words "also means" are construed with respect to the governmental clause, those same words must mean the same thing for the agent clause.

The agent clause decisively favors clarification over addition. Respondents concede that under their reading, "'agents' of covered private employers constitute an additional category of 'employer.'" RB32 (quoting OB28). But that result is unfathomable. The most common agents of an employer are its employees. That reading would impose unprecedented personal liability for discrimination on supervisors, human resources managers, and other employees who act as agents for their employers in making and carrying out employment decisions. Those employees could face personal liability for a colleague's retroactive salary—or even millions in damages for a class of employees. Such extraordinary liability simply cannot be squared

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[2] Respondents (RB13-14) claim support from *Johnson v. Mayor of Baltimore*, 472 U.S. 353 (1985), and *EEOC v. Wyoming*, 460 U.S. 226 (1983). But neither decision analyzed the question here, and before the Ninth Circuit here, every court that had done so adopted our reading.

with a statutory scheme that deems a 19-person company too small to penalize. OB28-30.

Every circuit to read the agent clause has found it does something more sensible: It clarifies that the statute incorporates principles of vicarious liability. In simple terms: It says that the employers described in the first sentence are responsible, as principals, for any acts agents take on their behalf. OB30. The same is true for the identical agent clause in Title VII. *Id.* This Court so held in *Burlington Industries, Inc. v. Ellerth*, which concluded that Title VII's agent clause is "an explicit instruction" to apply "agency principles" of vicarious liability to covered employers. 524 U.S. 742, 754 (1998).

If the ADEA's agent clause merely clarifies the scope of liability for employers described in the first sentence, the adjacent governmental clause must have the same function: It clarifies, not adds.

2. Like the Ninth Circuit, Respondents initially skip the agent clause entirely. It appears nowhere in Part I of their brief, which lays out their reading of the ADEA's "text" and "structure." Instead, the clause surfaces for the first time on page 31, labeled as a "consequentialist" rather than textual concern. RB25, 31. But that clause, appearing smack in the middle of the relevant text in this case, is unavoidable—and Respondents' attempts to avoid it speak volumes.

When Respondents finally turn to the agent clause, they torture it. They recognize that to prevail, they must argue that the agent clause adds *some* new category of employer who is separately liable. But

they also recognize that Congress would never have made all employees (who are quintessential "agents") independently liable for age discrimination undertaken at an employer's behest. So they rewrite the clause—and then duck. The rewrite: The phrase "agent of such a person" means "third-party independent contractors." RB32; *see* GB19. The result, Respondents contend, is that these independent contractors are directly liable for discriminating against their clients' employees. RB32; *see* GB19. Then, the duck: They urge this Court not to resolve "whether individual employees—such as supervisors or human resource managers—are *also* swept in by the agent clause." RB33; *see* GB20-21. Neither maneuver works.

a. Respondents offer no reason to redefine "agent" as "third-party independent contractors." Those terms are far from synonymous. By definition, an "[a]gent" "act[s] on" another person's "behalf" and is "subject" to their "control." Restatement (Second) of Agency § 1. An "[i]ndependent contractor," by contrast, is defined by the *absence* of such control: It means someone "entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it." *Independent Contractor*, Black's Law Dictionary (10th ed. 2014). In light of that distinction, "[c]olloquial use ... excludes independent contractor from the category of agent." Restatement (Second) of Agency § 14N cmt a.

Even if "agents" could be narrowed to "third-party independent contractors," Respondents are wrong to

suggest that there is precedent for holding such entities personally liable. RB32. Respondents purport to draw that rule from outdated decisions from three circuits. *Id.* (citing *Morgan v. Safeway Stores, Inc.*, 884 F.2d 1211 (9th Cir. 1989); *Williams v. City of Montgomery*, 742 F.2d 586 (11th Cir. 1984); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982)). But none held an independent contractor personally liable for discrimination under the agent clause. And each of those circuits has since clarified that agents under the ADEA are *not* employers in their own right; they merely trigger vicarious liability for their principals. *See Martin v. Chem. Bank*, 129 F.3d 114, at *3 (2d Cir. 1997) (unpublished); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993).

Respondents (RB32) and the Government (GB19) mistakenly rely on *City of Los Angeles Department of Water & Power v. Manhart* as recognizing their theory that independent contractors can be independently liable. 435 U.S. 702 (1978). It didn't. *Manhart* suggests only that Title VII's agent clause would impose *vicarious* liability on a "covered employer" that sought to "avoid[] *his* responsibilities by delegating discriminatory programs to corporate shells." GB19 (quoting *Manhart*, 435 U.S. at 718 n.33) (emphasis added; alteration omitted). Of course, that is exactly what *Burlington*, 524 U.S. at 754, held. *Supra* 11. Both cases support *our* reading—when Congress speaks of "agents," it means to clarify, not add.

b. What Respondents duck is the critical flaw in their reading of the agent clause: If, as they insist,

"'agents' of covered private employers constitute an additional category of 'employer'" that is separately liable for monetary damages, then that must be true of all "agents." Respondents do not deny that employees are the quintessential "agents" of employers. *See* Restatement (Second) of Agency § 2. That must mean that, under their reading, every employee who makes or implements employment decisions is personally liable for damages. OB28-29.

Respondents cannot refute the logic of this conclusion. Nor can they deny that this would be revolutionary—even catastrophic. They do not suggest why Congress would ever want to do that, or why it would do it so obliquely. They just punt: Because Respondents' tortured reading is "enough to give independent meaning to the [agent] clause," they assert, "this Court need not decide here whether individual employees" are covered. RB33; *see* GB20-21.

In the interest of winning this case, Respondents are walking this Court directly into the brick wall. The fact that there is no way around that wall is proof positive that Respondents' reading of the sentence is wrong. That conclusion is foundational, not "peripheral," GB20.

c. Respondents' and the Government's remaining arguments are meritless.

Respondents mistakenly suggest that reading the agent clause, as we do, to clarify that traditional principles of agency liability apply "would allow employers an end run around the statute." RB36. This Court did not share that concern in *Burlington*. With good

reason: By clarifying that employers are vicariously liable for the acts of their agents—without actually imposing independent liability on those agents—§ 630(b)'s agent clause *prevents* employers from avoiding liability through delegation. *See Burlington*, 524 U.S. at 754-55; *Manhart*, 435 U.S. at 718 n.33.

The Government is similarly mistaken in asserting that our reading of the agent clause requires agents to have at least 20 employees. GB20. It does not. Under our reading, the agent clause clarifies that a *qualifying "person"* with at least 20 employees is vicariously liable for acts by agents *of any size*.

3. We return then to Respondents' concession (RB32) that the words "also means" have the same meaning in both the governmental clause and the agent clause. Since those words as applied to the agent clause signal clarification of the preceding sentence—not a new category of independently liable employers—the same must be true of the governmental clause. As all other circuits to address the issue have held, it further clarifies the definition of "employer" in § 630(b)'s first sentence by specifying that only state and local governmental entities are subject to coverage, while federal entities are categorically excluded. OB9, 31-35. That is an important distinction—one that marked a substantial change from the original version of the statute. *See* OB24, 35-36.

As noted, Respondents do not dispute that "also means" may signal clarification. This is not hypothetical: Congress has used the words that way in other statutes. *E.g.*, 15 U.S.C. § 6809(9) ("consumer" "also means" the consumer's "legal representative," even

though the representative's personal information is not independently entitled to statutory protection). Instead, Respondents argue only that Congress "typically uses the phrase" in its additive sense instead, citing several statutes as examples. RB12. But those statutes differ from § 630(b) in both text and context. Take 15 U.S.C. § 1471(3) and 12 U.S.C. § 1715z-1(i)(4)—the two examples that Respondents highlight. They contain no employee minimum; no mention of "person"; no agent clause or attendant possibility of vicarious liability; and no phrase modified by "also means" that—like the governmental clause—distinguishes between what the statute includes and excludes. So while they show that "also means" can signal an additional category, they shed little light on the meaning of that phrase in § 630(b).

"[I]n law as in life, ... the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion). This Court has repeatedly departed from the "typical" meaning of a statutory term where context so requires. *See* OB33-34. The ADEA's text and context compel the same result regarding "also means" in § 630(b).

C. Two interpretive principles resolve any ambiguity in favor of applying the minimum-employee requirement.

If there were any lingering ambiguity, two canons of construction would resolve it in the Fire District's favor.[3]

1. Respondents (RB36) concede that courts may not read statutes to override the "usual constitutional balance of federal and state powers" where Congress has not clearly expressed its intention to do so. *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014); *see* OB37. They do not dispute that their reading constrains state power in two ways: (1) by constricting hiring and firing decisions at small state agencies, thereby reducing States' "power to define the qualifications of their officeholders," *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991); and (2) by overriding state judgments as to what sized agencies and political subdivisions can tolerate the burdens of age-discrimination liability. OB37-38. Rather, Respondents argue that these are not the sorts of federal intrusions that implicate the clear statement rule.

In support, Respondents and the Government cite *Jinks v. Richland County*, 538 U.S. 456 (2003). RB37;

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[3] Respondents' halfhearted invocation of *Skidmore* deference (RB24-25) falls short. The EEOC has never offered a reasoned analysis of the meanings of "person" or "agent" under § 630, or how to square those terms with the governmental clause. It thus has not offered a persuasive reading of the governmental clause "in [its] context," as this Court requires. *Sturgeon*, 136 S. Ct. at 1070.

GB27. But *Jinks* held only that Congress was not required to specify in "unmistakably clear" language that a federal law suspends state-law limitations periods in suits against local governments. 538 U.S. at 466. The reason was that state entities were *not* implicated by the question presented. Where suits against state entities were concerned, this Court had *already required* an "unmistakably clear" statement in *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 534 (2002); *see Jinks*, 538 U.S. at 466. Here, Respondents' reading of § 630(b) would undeniably expand the liability of state agencies as well as political subdivisions, so this is a *Raygor* case, not a *Jinks* case. Moreover, the statute in *Jinks* merely extended the procedural window for existing causes of action. Here, Respondents' reading of the ADEA would substantively expand a federal cause of action, OB38, 56-57, a far more substantial intrusion on sovereignty.

Respondents' reliance on *EEOC v. Wyoming*, 460 U.S. 226 (1983), is similarly misplaced. RB37. *Wyoming* held that the Constitution does not prohibit Congress from extending ADEA coverage into the public sphere. *Id.* at 228-29. We agree. But that does not displace the separate rule that Congress must make its intent to do so unequivocally clear.

2. Our reading would also avoid constitutional concerns by ensuring that the ADEA's Commerce Clause hook—that covered employers must "affect[] commerce," § 630(b)—applies to private and public entities alike. OB40-42. The Government attempts to minimize this issue by suggesting that Congress "ordinarily" omits such a hook when "independently address[ing] public entities." GB28. But it cites

examples that prove otherwise: Both the FLSA and Family and Medical Leave Act expressly state that covered governmental entities are engaged in commerce. 29 U.S.C. §§ 203(s), 2611(4)(B). Reading the ADEA to omit such a statement would raise novel questions about the statute's constitutionality—a result this Court must avoid by endorsing the majority reading. OB41.

II. Applying The ADEA's Employee Minimum To Political Subdivisions Best Harmonizes The ADEA With Congress's Purpose And Other Antidiscrimination Statutes.

As our opening brief explains (at § II), Respondents' reading creates inexplicable rifts along several dimensions: (1) it yields different employee minimums for public and private employers, OB46-49; (2) it leaves public entities without Congress's customary statutory Commerce Clause hook, OB49-50; and (3) it eliminates respondeat superior liability completely for public entities, OB50-51. And in each respect, Respondents' reading would drive a wedge between the ADEA and its sister statutes, Title VII and the ADA. OB46-51. Respondents fail to explain how their reading "produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

A. Respondents first contest the very premise that Congress's purpose in amending the ADEA was to eliminate—not create—disparities between public and private employers. RB22-24. They do not deny that Congress harbored—and achieved—that intention two years earlier when it amended Title VII. Nor

do they dispute that the bill's sponsor, Senator Bentsen, said the ADEA amendments—originally drafted at the same time as the Title VII amendments—replicated Title VII's aim. OB45.

Respondents deride reliance on Senator Bentsen's statements. RB23-24. Yet they ignore the Senate Special Committee on Aging's statement to the same effect: It is "difficult to see why one set of rules should apply to private industry and varying standards to government." Special S. Committee on Aging, 93d Cong., Improving the Age Discrimination Law 17 (Comm. Print. 1973); *see* OB45-46. Respondents do not dispute that this committee report is authoritative. In fact, they cite (RB23) another report of the same committee, and present *it* as authoritative.

As to that report, Respondents seize on a single sentence summarizing that the 1974 amendments "[e]xten[ded] coverage to Federal, State, and local governmental employees" and "broaden[ed] ... the Act to include private employers with 20 or more employees (instead of 25 as under prior law)." Special S. Committee on Aging, 94th Cong., Action on Aging Legislation in 93d Cong. 9 (Comm. Print. 1975). Respondents incorrectly label this a "contemporaneous report," RB23, but it actually is a post-enactment collection of rote summaries of legislation relevant to "older Americans," Special S. Committee on Aging, 94th Cong., *supra*, at 9. This hardly overrides the *actually* contemporaneous, specific, and substantive statements of the same Committee and Senator Bentsen that public-private parity was Congress's aim.

B. Respondents next dispute that Congress intended to harmonize the ADEA's employee minimum with its sister antidiscrimination statutes, Title VII and the ADA. Instead, they say, "the ADEA should track ... the FLSA," which "applies to political subdivisions regardless of size." RB26-27. But on the very same page, Respondents undermine this position with a concession: that "the ADEA's '*substantive*, antidiscrimination provisions' are modeled after Title VII." RB26 (quoting *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995)) (emphasis added); *see* GB21.

Respondents claim that "the ADEA's *who*"—the "definitions" dictating which entities are covered—is not substantive. RB27. But "substantive law" generally means any law (including definitions) that "creates, defines, and regulates the rights, duties, and powers of parties." *Substantive Law*, Black's Law Dictionary (10th ed. 2014). Thus, a provision that imposes liability on small political subdivisions is substantive, making Title VII the appropriate comparator. Respondents do not cite a single authority suggesting that a statute directing who is prohibited from engaging in primary conduct is procedural.

Contrary to Respondents' view (RB26-27), § 626(b) of the ADEA, which incorporates by reference portions of the FLSA, only confirms that the rules governing "who" is covered are substantive. Section 626(b) adopts a classic substantive/procedural distinction. It provides that the ADEA "shall be *enforced* in accordance with the powers, remedies, and *procedures* provided in" three sections of the FLSA. 29 U.S.C. § 626(b) (emphasis added). That does not mean

that rules of "who" is covered "are drawn from the FLSA." RB27.

Even if the FLSA were the right comparator, it would not support Respondents' view that the ADEA applies different rules to public and private entities. True, Congress "extended the FLSA['s] [coverage] to 'public agenc[ies],' regardless of size." GB22 (quoting FLSA Amendments § 28, Pub. L. No. 93-259, 88 Stat. 74 (1974)); RB28. But the FLSA does not, and never did, include an employee minimum for *any* entity, public or private. 29 U.S.C. § 203(a), (d); *see* 29 U.S.C. § 203(a), (d) (1970). It thus accomplishes the same public-private parity as Title VII and the ADA. So Respondents' reading creates disharmony between the ADEA and every plausible comparator in federal law.

In another effort to justify the statutory anomalies, Respondents point to the "ADEA's own treatment of federal employers," noting that the "ADEA covers federal agencies irrespective of size." RB28 (citing 29 U.S.C. § 633a). But Title VII—which indisputably applies its employee minimum to States and political subdivisions—also applies no minimum to federal employers. 42 U.S.C. § 2000e-16. The reason for the distinction there, and here, is that a discrimination suit would not put a federal agency on the brink of extinction, the way it would for a small poli ical subdivisions or private business.

Finally, Respondents claim support from state antidiscrimination laws. They note that the laws of "[a] majority of [States] cover political subdivisions regardless of size." RB28-29 & n.6. But they acknowledge that half the States they cite have no

employee minimum for *any* type of employer, public or private. *Id.* They treat public and private employers the same. As for the small minority that treats public and private differently, all but one of these States at least applies the same minimums for all of their antidiscrimination laws—i.e., for discrimination on the basis of age, race, sex, and so forth. So Respondents' nationwide search only proves that their reading of the ADEA truly stands alone.

C. Respondents do not deny most of the disparities that their reading creates, confining themselves mainly to the argument that they do not matter. The exception is our assertion (OB50-51) that their reading eliminates vicarious liability for public employers. Respondents seem to concede that Congress could not have intended something so horribly anomalous. But their reading in fact creates an even bigger problem: It threatens to eliminate vicarious liability not just for public employers under the ADEA, but for *all* employers accused of *any* sort of discrimination.

Here is how: Respondents insist the agent clause does not (as we contend) codify vicarious liability, but instead establishes personal liability for independent contractors. That means all the circuits that have concluded that the agent clause codifies vicarious liability are wrong. Worse, that must mean that the nearly "identical[]" agent clauses in both Title VII, RB32, and the ADA have the same limited meaning, and do not support respondeat superior. That, in turn, must mean this Court was wrong in concluding that Title VII's version of the agent clause establishes respondeat superior. *See Burlington*, 524 U.S. at 754.

To avoid the mischief they create by narrowing the agent clause, Respondents try to smuggle respondeat superior liability back into the ADEA through the word "employer." RB34. They argue that "[a] lawsuit for [employment] discrimination is, in effect, a tort action," so Congress must have adopted "ordinary tort-related vicarious liability rules." *Id.* (citations and internal quotation marks omitted). But that doesn't work. Respondents have no answer to the point (OB31) that this Court has not imported respondeat superior liability into other statutorily defined torts, such as § 1983 and Title IX, that lack agent clauses. And their theory cannot be squared with *Burlington*, which made no mention of implicit tort principles and relied instead on Title VII's agent clause. Strive as they might, their anomaly persists.

This is all easily avoided. The better reading: When Congress used the word "agent" in these statutes it meant "agent." It thus used § 630(b)'s second sentence to codify principles of agency liability for all employers, public and private, in all three statutes. OB27-31, 50-51. No anomalies. No contortions. Just common usage, common sense, and a statute that works the way Congress intended.

III. The Ninth Circuit's Rule Threatens The Survival Of Small Political Subdivisions.

Respondents' reading could impose devastating costs on small political subdivisions—effects Congress could not have intended. OB § III; Br. of Nat'l Conf. of State Legislatures. Respondents' argument to the contrary boils down to a list of entities that may not be affected, based on the quiddities of their particular

States' laws. RB39-40. This ignores the plight of the thousands of entities that unquestionably *would* be affected by the ruling. The many States that *do* have employee minimums for political subdivisions, *see* OB38-39, have made the judgment that their political subdivisions—like small businesses—cannot bear the costs of a lawsuit. States are best equipped to make these decisions. Only our reading of § 630(b) preserves their flexibility to do so.

Finally, Respondents lob in the parting accusation that the Fire District seeks "a free pass under federal law to discriminate on the basis of age." RB40-41. But they ignore what Congress understood: Even the most baseless allegations of age discrimination impose crippling costs on small political subdivisions. The reality is that age discrimination complaints with "very few factual allegations" can still "m[e]et the low threshold of content demanded by Federal Rule of Civil Procedure 8." *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 494 (5th Cir. 2015). In the ADEA—as in Title VII and the ADA—Congress made the eminently sensible judgment that a public entity that relies on local taxpayers and bake sales to supply critical services should not bear the costs of an unwarranted federal lawsuit.

CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse the judgment of the Court of Appeals.

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No. 17-587

In the Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT, PETITIONER

v.

JOHN GUIDO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the term "employer" in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, applies to all political subdivisions or only those with 20 or more employees.

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In the Supreme Court of the United States

No. 17-587

MOUNT LEMMON FIRE DISTRICT, PETITIONER

v.

JOHN GUIDO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the proper interpretation of the definition of "employer" in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, as applied to political subdivisions. The Equal Employment Opportunity Commission (EEOC) is responsible for administering and enforcing the ADEA, which prohibits age discrimination in employment. 29 U.S.C. 623(a), 626(a)-(b). The proper interpretation of "employer" as to political subdivisions thus affects the EEOC's administration of the ADEA. The EEOC accordingly participated as amicus curiae in this case in the court of appeals.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. Congress enacted the ADEA to protect workers and applicants from "arbitrary age discrimination in employment." 29 U.S.C. 621(b). The ADEA makes it "unlawful for an employer * * * [to] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). It also prohibits retaliation against an individual for filing a charge of or opposing age discrimination. 29 U.S.C. 623(d).

The ADEA initially governed only private-sector employers, as the statutory definition of "employer" did "not include the United States * * * or a State or political subdivision thereof." 29 U.S.C. 630(b) (1970). In 1974, however, Congress amended the ADEA to extend its protections to public-sector employees. See Fair Labor Standards Amendments of 1974 (FLSA Amendments), Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74. Since that time, the ADEA has provided:

> The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * * . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. 630(b). The statute separately defines the term "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. 630(a).

2. a. In 2000, respondents John Guido and Dennis Rankin began working for petitioner Mount Lemmon Fire District, a political subdivision in Arizona. Pet. App. 3a. Respondents eventually were promoted to full-time firefighter captains. *Ibid.*; see *id.* at 19a. In 2009, petitioner terminated their employment. *Id.* at 3a. At the time, Guido was 46 years old and Rankin was 54 years old, making them petitioner's oldest full-time employees. *Ibid.*

b. Respondents filed charges of age discrimination with the EEOC. Pet. App. 3a. Following an investigation, the EEOC found reasonable cause to believe that petitioner had violated the ADEA. *Ibid.* Respondents then filed suit in federal district court, alleging that petitioner had discriminated against them based on their age, in violation of the ADEA. *Ibid.*; see *id.* at 19a-20a.

Petitioner moved for summary judgment. Pet. App. 18a. It contended that it is not an "employer" within the meaning of the ADEA because it had fewer than 20 employees during the relevant time period. *Id.* at 20a-21a. Respondents, meanwhile, contended that the 20-employee requirement in 29 U.S.C. 630(b) applies to private employers but not to States or political subdivisions. Pet. App. 21a.

The district court granted petitioner's motion. Pet. App. 18a-37a. The court agreed with petitioner that the ADEA's 20-employee threshold applies to political subdivisions as well as to private employers. *Id.* at 20a-26a. In reaching that conclusion, the court quoted at length

from the Seventh Circuit's decision in *Kelly* v. *Wauconda Park District*, 801 F.2d 269 (1986), cert. denied, 480 U.S. 940 (1987), which held that the ADEA is ambiguous but that the legislative history reveals Congress's intent to apply the 20-employee threshold to political subdivisions. See Pet. App. 22a-25a. Because the district court determined that petitioner "did not have the required 20 employees during the relevant time frame," it granted petitioner's motion for summary judgment and dismissed the case. *Id.* at 37a.

3. The court of appeals reversed. Pet. App. 1a-17a. Because the ADEA provides that the term "employer" "also means * * * a State or political subdivision of a State," 29 U.S.C. 630(b), the court of appeals first examined the "ordinary meaning" of the word "also." Pet. App. 7a-8a. The court explained that "[t]he word 'also' is a term of enhancement; it means 'in addition; besides' and 'likewise; too.'" *Id.* at 7a (quoting *Webster's New Collegiate Dictionary* 34 (1973)). "[I]n this context," the court concluded, "'also' adds another definition to a previous definition of a term" rather than "clarify[ing] the previous definition." *Ibid.* To buttress that conclusion, the court compared the ADEA to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 9a-10a. It reasoned that Congress "knew how to use language to ensure that an employee minimum applied to political subdivisions," and it used such language in Title VII—but not in the ADEA. *Id.* at 10a; see *id.* at 9a-10a & n.6, 13a.

The court of appeals acknowledged that several other circuits had declared Section 630(b) ambiguous. Pet. App. 11a (citing *Cink* v. *Grant Cnty.*, 635 Fed. Appx. 470 (10th Cir. 2015); *Palmer* v. *Arkansas Council on Econ. Educ.*, 154 F.3d 892 (8th Cir. 1998); *EEOC* v.

Monclova Twp., 920 F.2d 360 (6th Cir. 1990); *Kelly*, *supra*). But the court noted that those decisions "all rely entirely" on *Kelly*, which had failed to discuss "the statute's actual language" before "declaring that multiple reasonable interpretations exist." *Id.* at 11a, 13a. The court thus concluded that "there is no valid justification to depart from the plain meaning of the language" of Section 630(b). *Id.* at 14a. The court further noted that, even if the ADEA were ambiguous, *Kelly* had relied on legislative history that did not address the specific question at issue. *Id.* at 15a-16a.

Finally, the court of appeals rejected the argument that Congress must have intended to treat public and private employers similarly under the ADEA. Pet. App. 16a. The court explained that it could envision "plenty of perfectly valid reasons why Congress could have structured the statute the way it did"—such as the belief that governmental entities "can better bear the costs of lawsuits * * * or that government should be a model of non-discrimination." *Id.* at 16a & n.10. "In any event," the court concluded, "it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute." *Id.* at 16a.

SUMMARY OF ARGUMENT

I. The ADEA defines the term "employer" to encompass political subdivisions, regardless of their size.

A. "As with any other question of statutory interpretation," the analysis must "begin with the text." *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016). The first sentence of Section 630(b) provides that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees." 29 U.S.C. 630(b). The second sentence then provides that "[t]he term ['employer'] *also means* * * * a State

or political subdivision of a State." *Ibid.* (emphasis added). Because the ordinary meaning of "also" is "in addition to," the second sentence defines an additional category of covered employers—namely, States and political subdivisions. Congress did not apply any minimum-employee requirement to that category.

The formulation that Congress chose in the ADEA was no accident: Just two years before amending the ADEA, Congress amended Title VII of the Civil Rights Act of 1964 to extend that statute, including its minimum-employee requirement, to governmental employers. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. It did so by defining governmental entities as "person[s]" subject to a 15-employee threshold, rather than defining governmental entities as a separate category of "employer." See 42 U.S.C. 2000e(a)-(b). When Congress later amended the ADEA, it chose a different path, consistent with the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, instead of Title VII. This Court "presume[s]" that Congress "acted intentionally" in adopting different amendments to Title VII and the ADEA. *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009).

Petitioner contends (Br. 17-36) that the rest of Section 630 requires that the phrase "also means" be read to signify "includes." But "includes" is not an available meaning of the word "also." At a minimum, it is not the ordinary meaning, and the two textual features that petitioner identifies do not justify a departure from that ordinary meaning. First, the term "person" in Section 630(a) does not cover States and political subdivisions, and it would not change the definition of "employer"

even if it did. Second, the inclusion of "agent[s]" in Section 630(b)'s second sentence introduces an additional category of employers, including entities to which an employer delegates employment decisions, and thus reflects the ordinary meaning of "also means."

B. The history of the ADEA amendments buttresses the statute's plain text. Congress added the relevant statutory language as part of legislation amending the FLSA, see FLSA Amendments § 28, 88 Stat. 74, on which Congress had modeled other aspects of the ADEA. That legislation extended the FLSA's coverage to "public agenc[ies]," regardless of their size. § 6(a)(1), 88 Stat. 58; see 29 U.S.C. 203(d). The same act also extended the ADEA to States and politica! subdivisions, regardless of their size. The relevant House and Senate Reports accordingly describe the ADEA amendments as "a logical extension of the * * * decision to extend FLSA coverage to Federal, State and local government employees." H.R. Rep. No. 913, 93d Cong., 2d Sess. 40 (1974); S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974).

C. Because Section 630(b) is clear, petitioner's resort to two structural canons of construction (Br. 36-43) is unavailing. Regardless, neither the federalism canon nor the constitutional-avoidance canon applies here. The selection of a one-employee versus a 20-employee threshold in a federal law that already regulates States and that subjects States to limited financial liability would not "upset the usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). And the constitutional concerns that petitioner raises are not serious in light of this Court's existing Commerce Clause doctrine. See *EEOC* v. *Wyoming*, 460 U.S. 226, 243 (1983).

II. Finally, history refutes petitioner's fears (Br. 54-57) about the application of the ADEA to small political subdivisions. For more than 30 years, the EEOC has maintained that the term "employer" encompasses all political subdivisions, and it has accepted charges against such entities where appropriate. The majority of States also forbid age discrimination by political subdivisions of any size—including some States whose age-discrimination laws, like the ADEA, apply numerical thresholds to private employers. Despite those long-standing practices, small political subdivisions have not disappeared under crushing financial liability. And Congress remains free to craft additional exemptions to the ADEA if it believes that any substantial threat exists.

ARGUMENT

I. THE ADEA DEFINES THE TERM "EMPLOYER" TO ENCOMPASS POLITICAL SUBDIVISIONS OF ANY SIZE

A. The Text Of Section 630(b) Makes Plain That Political Subdivisions Are An Independent Category Of "Employer"

As this Court has repeatedly recognized, statutory interpretation "begin[s] with the text." *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1079 (2016). If the "statutory text is plain and unambiguous," a court "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009). Here, the text of Section 630(b) clearly extends the ADEA's coverage to any political subdivision of a State.

1. The phrase "also means" defines an additional category of eligible "employer"

The ADEA prohibits an "employer" from discriminating based on age. 29 U.S.C. 623(a). Section 630(b) then defines a covered "employer":

> The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * * . The term *also means* (1) any agent of such a person, and (2) *a State or political subdivision of a State* and any agency or instrumentality of a State or political subdivision of a State, and any interstate agency, but such term does not include the United States.

29 U.S.C. 630(b) (emphases added).

On its face, Section 630(b) establishes three separate categories of "employer[s]." The first sentence defines one category of "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees." *Ibid.* The second sentence then sets out two additional categories of "employer[s]": (1) "any agent of such a person"; and (2) "a State or political subdivision of a State," along with certain other governmental entities. *Ibid.* The second sentence does not itself subject those two categories—agents and governmental entities—to the same 20-employee threshold that the first sentence applies to "person[s]."

As the court of appeals explained, see Pet. App. 7a-8a, 13a, Congress's use of the word "also" separates the two sentences. Because the term "also" was "left undefined by the statute, [it] carries its ordinary meaning." *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009). And the familiar dictionary definition of "also," in 1974 as now, is "[b]esides; in addition; likewise; too." *American Heritage Dictionary of the English Language* (1976); see, *e.g.*, *Webster's Third New International Dictionary* 62

(1966) ("in the same manner as something else: likewise"; "in addition: as well"); *Webster's New Collegiate Dictionary* 34 (1977) ("likewise"; "in addition: too") (capitalization omitted); *Merriam-Webster's Collegiate Dictionary* 35 (11th ed. 2005) ("likewise"; "in addition: besides, too"); *New Oxford American Dictionary* 46 (3d ed. 2010) ("in addition; too"). Because "also" is additive, Congress used the term to introduce other categories of eligible "employer[s]," rather than to clarify the category of "person[s] engaged in an industry affecting commerce who ha[ve] twenty or more employees." 29 U.S.C. 630(b).

Nor does the word "also" stand alone in Section 630(b). Congress paired it with the verb "means"—its ordinary tool for introducing the definition of a term. See *Burgess* v. *United States*, 553 U.S. 124, 130 (2008). As respondents observe (Br. 11-12 & n.2), many statutes use the phrase "also means" to introduce additional definitions. When Congress provided that "[t]he term ['employer'] also means * * * a State or political subdivision of a State," 29 U.S.C. 630(b), it thus created an additional, self-contained definition. If Congress had intended solely to clarify that the governmental entities described in Section 630(b)'s second sentence fall within the category of employers described in the first sentence, it might at a minimum have chosen a more "illustrative" verb, such as "includes," to suggest elaboration rather than definition. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012); see, *e.g.*, 18 U.S.C. 229F(6)(A); 26 U.S.C. 3231(b) (Supp. IV 2016); 42 U.S.C. 10101(18).

This Court has previously acknowledged, at least in passing, the plain import of Section 630(b)'s text.

In *EEOC* v. *Wyoming*, the Court observed that "Congress extended the substantive provisions of the [ADEA] to employers having at least 20 workers, *and* to the Federal and State Governments." 460 U.S. 226, 233 (1983) (emphasis added), abrogated in part by *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000). And the Court made the same observation two years later in *Johnson* v. *Mayor & City Council of Baltimore*: "Congress extended [the ADEA's] coverage to Federal, State, and local Governments, *and* to employers with at least 20 workers." 472 U.S. 353, 356 (1985) (emphasis added). To be sure, neither of those decisions presented the issue here. But at least in describing the 1974 amendments to the ADEA, the Court has never paused over the ordinary meaning of the term "also."

2. Congress eschewed an obvious alternative formulation for extending the minimum-employee requirement

The language of the ADEA is particularly significant because Congress could have borrowed an alternative formulation from Title VII of the Civil Rights Act of 1964 to impose a numerical threshold on governmental entities. See Pet. App. 9a-10a. It did not. Instead, it extended coverage to all governmental entities—just as it simultaneously did for the FLSA.

Prior to 1972, Title VII and the ADEA defined "employer" in nearly identical ways. Title VII provided that "employer" means "a person engaged in an industry affecting commerce" with 25 or more employees, and "such term does not include * * * the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof." Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 701(b), 78 Stat. 253 (42 U.S.C.

2000e(b)). It defined "person" as, *inter alia*, an individual or corporation. § 701(a), 78 Stat. 253 (42 U.S.C. 2000e(a)). The original ADEA likewise defined "employer" as a person engaged in interstate commerce with 25 or more employees, and provided that "such term does not include the United States * * * or a State or political subdivision thereof." ADEA, Pub. L. No. 90-202, § 11(b), 81 Stat. 605. Also like Title VII, the ADEA defined "person" in Section 630(a) as, *inter alia*, an individual or corporation. § 11(a), 81 Stat. 605.

Despite those similarities, the 1972 Congress expanded only Title VII's coverage. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. It deleted from the definition of "employer" the exclusion for certain governmental entities. § 2(2), 86 Stat. 103. And it added to the definition of "person" in the prior subsection "governments, governmental agencies, [and] political subdivisions." § 2(1), 86 Stat. 103. Because Title VII regulates as "employers" only those "persons" with at least (as amended) 15 employees, and because Congress redefined certain governmental entities as "persons," the 1972 amendments plainly established that political subdivisions were subject to Title VII's 15-employee threshold. See 42 U.S.C. 2000e(a)-(b).

Two years later, a different Congress amended the ADEA. It did *not* follow the model set out in Title VII, by adding governmental entities to the definition of "person" in Section 630(a) and thus clearly subjecting those entities to a minimum-employee requirement. Instead, it modified the ADEA's definition of "employer," adding that the term "also means * * * a State or political subdivision of a State." FLSA Amendments

§ 28(a)(2), 88 Stat. 74; see 29 U.S.C. 630(b). "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). This Court has thus previously explained that it "cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Ibid.* Here, too, Congress chose to amend Section 630(b)'s definition of "employer" rather than Section 630(a)'s definition of "person," and its choice to forgo a clear alternative path "requires respect, not disregard." *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2072 (2018).

Tellingly, in the same enactment, Congress made the same choice in amending the FLSA—on which parts of the ADEA had been modeled. See *Lorillard* v. *Pons*, 434 U.S. 575, 584-585 (1978). Petitioner does not appear to dispute that the 1974 amendments expanded the FLSA to reach all governmental entities, regardless of their size. FLSA Amendments § 6(a), 88 Stat. 58, 60; see pp. 21-25, *infra*. The natural inference is that, when Congress grouped the ADEA amendments with the FLSA amendments and deviated from the language of the Title VII amendments, it intended the ADEA's coverage of governmental entities to look more like the FLSA's.

3. Petitioner fails to justify departing from the ordinary meaning of the phrase "also means"

Petitioner acknowledges (Br. 27, 35) that the plain-text reading of Section 630(b) is "plausible," or even "ordinary." But it insists (Br. 18) that the phrase "also means" is better read to "signif[y] 'includes' or 'incorporates.'" Petitioner therefore contends (Br. 17-19, 27) that the "persons" described in the first sentence of

Section 630(b) *include* political subdivisions, which are accordingly subject to the 20-employee threshold. That is not the ordinary meaning of the phrase "also means," and other parts of the ADEA do not compel that unusual reading.

a. In ordinary English, the phrase "also means" and the term "includes" perform entirely different functions: "Also means" introduces an additional category that has not yet been addressed, see pp. 9-11, *supra*, whereas "includes" clarifies a preexisting category, see *Black's Law Dictionary* 880 (10th ed. 2014) ("To contain as a part of something."). In petitioner's view, the two collapse here because the word "also" has been defined as "[e]xpressing amplification." Br. 18 (quoting *Oxford English Dictionary* (3d ed. 2011), http://www.oed.com/view/Entry/5740?redirectedFrom=also#eid (*OED*); see Br. 27 (same). But that lone dictionary definition does not give petitioner much of a toehold. The full definition reads: "Expressing amplification: as a further point, item, or circumstance tending in the same direction; further, in addition, besides, as well, too." *OED*. That full definition—describing "a further point * * * tending in the same direction," or a point "in addition" to an initial point, *ibid.*—accords with the ordinary meaning of "also." It does not support petitioner's suggestion (Br. 18) that "also" sometimes means "includes" within or "incorporates" into an already-stated category.

b. Because petitioner cannot escape the ordinary import of the phrase "also means," it encourages (Br. 33-35) the Court to "depart from a standard dictionary definition where compelled by the surrounding text." But petitioner's two appeals to the surrounding text do not justify such an interpretive stretch.

i. The definition of "employer" in Section 630(b) covers in its first sentence "a person engaged in an industry affecting commerce who has twenty or more employees" and in its second sentence "a State or political subdivision of a State." 29 U.S.C. 630(b). Petitioner contends (Br. 20-24) that, regardless of the second sentence, local political subdivisions are already "person[s]" by virtue of the first sentence. To support that contention, petitioner looks (Br. 19-20) to a separate definitional provision, Section 630(a), which defines "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. 630(a). For several reasons, that argument—which petitioner raises for the first time in this litigation, see Pet. App. 5a—fails.

As an initial matter, the definition of the term "person" does not resolve the question presented. Even if the term "person" in Section 630(a) includes governmental entities, that does not alter the plain meaning of Section 630(b)'s second sentence. Assuming that the term "employer" means any person (including political subdivisions) with 20 or more employees, Congress amended the ADEA to make clear that it "also means" any political subdivision, without a minimum-employee requirement. By analogy, consider a park regulation that said: "Only designated animals are allowed in the park. A designated animal means any dog on a leash." Then suppose the park authority amended the regulation to add: "It also means any police dog or service dog." The amendment makes clear that a police or service dog is allowed in the park, whether it is on a leash or not. So too here. Even if petitioner were correct that a political subdivision is a "person" under Section

630(a), it would be subject to the ADEA under Section 630(b), whether it has 20 employees or not.

In any event, petitioner is wrong that governmental entities are among the "persons" listed in Section 630(a). Petitioner asserts (Br. 20-21) that political subdivisions are "organized groups of persons." But the phrase "organized groups of persons" appears at the end of a list of private entities—"individuals, partnerships, associations, labor organizations, corporations, business trusts, [and] legal representatives"—without any mention of governmental entities. When a broad catch-all phrase follows a list of specific examples, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17, at 188 (5th ed. 1992)). The phrase "organized groups of persons" thus most naturally covers other private groups. That is especially true because Congress specifically addressed governmental entities elsewhere, in Section 630(b). See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645-646 (2012).

Petitioner's theory would also create an unsupportable distinction between small state instrumentalities and small local bodies. The term "person" presumptively excludes States or state instrumentalities. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000). Because the definition of "person" in Section 630(a) does not expressly mention state entities, those entities are not "persons." On petitioner's reading, then, local governments are "persons" and are subject to the 20-employee

minimum in the first sentence of Section 630(b), while Section 630(b)'s second sentence merely *clarifies* their eligibility. But because States and state instrumentalities are not "persons," the second sentence of 630(b) necessarily *adds* those entities to the list of covered employers, perhaps without applying the 20-employee minimum. Petitioner offers no basis for distinguishing small state and local bodies, when the text of the ADEA treats such entities as a uniform category. See 29 U.S.C. 630(b).

In addition, petitioner's construction of the ADEA would introduce significant surplusage: If political subdivisions already fall within the definition of "person" in Section 630(a), Congress would not have needed to *add* political subdivisions to the definition of "employer" in Section 630(b). Congress could simply have deleted the exclusion for governmental entities, and left it at that. Yet it specified that the term "employer" "also means * * * a State or political subdivision," 29 U.S.C. 630(b), strongly indicating that it did not understand the definition of "person" in Section 630(a) to capture governmental entities. Petitioner counters (Br. 22, 24) that the definition of "person" must include such entities, or the ADEA's current exclusion for the United States and original exclusion for all governmental entities would be superfluous. The more natural inference is that, when Congress enacted the ADEA, it "intended to remove any doubt" that the sweeping new federal statute did not apply to governmental entities (and that the current provision does not apply to the United States). *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008). In any event, petitioner cannot rely on "the canon against superfluity," which "assists only where a competing interpretation gives effect to every clause and word of a

statute," *Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation and internal quotation marks omitted), because his reading does not.

Finally, petitioner asserts (Br. 22-23) that Section 630(c) treats political subdivisions as "persons." The ADEA prohibits age discrimination by an "employment agency," 29 U.S.C. 623(b), which it defines to mean "any person regularly undertaking * * * to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States," 29 U.S.C. 630(c). That definition indicates that an employment agency must be a "person" that "procure[s] employees *for an employer*." *Ibid.* (emphasis added). Because Section 630(b) indisputably defines "employer" to include States and political subdivisions, an employment agency of a State or political subdivision is covered, so long as that employment agency is a "person." For example, Section 630(c) applies to a private recruiting firm hired by a political subdivision. That says nothing about whether the State or political subdivision is itself a "person."

ii. Petitioner next contends (Br. 27-31) that Section 630(b)'s second sentence cannot define governmental entities as a distinct category of "employer" because it also covers agents. That sentence says that "employer" in the ADEA "also means (1) any agent of such a person, and (2) a State or political subdivision of a State." 29 U.S.C. 630(b). In petitioner's view (Br. 28), reading the agent clause as identifying a distinct category of employer is "unfathomable" because it would make agents "*independently* liable for discriminatory employment practices." Far from unfathomable, that is precisely what the clause accomplishes.

The agent clause creates an additional category of covered "employer": outside entities that an employer enlists to handle its employment decisions. Without the clause, such corporate delegates likely could make discriminatory decisions on the employer's behalf without facing any liability, as affected workers would not be the agent's own "employees," 29 U.S.C. 623(a), and the employer itself would not be vicariously liable for the independent contractor's actions, see Resp. Br. 32-33, 36. The agent clause thus prevents employers from outsourcing discrimination and circumventing the ADEA's protections. Indeed, this Court has explained that a similar "agent" clause in Title VII prevents an employer from "avoid[ing] his responsibilities by delegating discriminatory programs to corporate shells." *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 718 n.33 (1978).[1] Petitioner cannot sensibly dispute that the core of the agent clause expands liability to an independent category of "employer."

Nor does petitioner address how Section 630(b)'s minimum-employee requirement would apply to the agent clause under its "clarification" theory. If petitioner is right (Br. 32) that the phrase "also means" merely "clarifies what is included in the definition of 'employer' in § 630(b)'s first sentence," and thus a political subdivision must be subject to the 20-employee

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[1] See, *e.g.*, *Spirt* v. *Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982) ("[D]elegation of responsibility for employee benefits cannot insulate a discriminatory plan from attack under Title VII."), vacated and remanded, 463 U.S. 1223 (1983), reinstated on remand, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984); *Carparts Distribution Ctr., Inc.* v. *Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 17-18 (1st Cir. 1994) (similar, under Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*).

threshold, then agents likewise must be subject to the 20-employee threshold. That would require both the employer *and* its agent to have at least 20 employees to trigger the ADEA's protections. Consequently, the ADEA would not apply whenever a large employer directs a small agent to execute discriminatory practices. A clause designed to prevent circumvention of the ADEA cannot bear such a reading.

Petitioner instead focuses (Br. 28-30) on the peripheral question—not presented here—whether supervisory employees are also subject to independent liability under the agent clause. As an initial matter, it is not clear that the clause reaches individual employees. After all, statutes providing for employer liability already make employers liable for acts of employees within the scope of their duties. See Restatement (Third) of Agency § 2.04 (2006); Resp. Br. 33-34; cf. *Meyer* v. *Holley*, 537 U.S. 280, 285-286 (2003). There is thus no apparent reason why Congress would have swept beyond independent entities to reach an employer's own supervisors. But even assuming it did, those supervisory employees would not necessarily face individual liability. Several courts of appeals have construed the agent clause to reach only employees acting in their official capacities, and thus to permit recovery only from the employer under respondeat-superior principles. See, *e.g.*, *Birkbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir.), cert. denied, 513 U.S. 1058 (1994); see also *Harvey* v. *Blake*, 913 F.2d 226, 227-228 (5th Cir. 1990) (similar, in Title VII context). Those decisions reflect the presumption that common-law limitations on liability apply unless a statute "speak[s] directly to the question." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citation and internal quotation marks omitted); see,

e.g., *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 613-619 (2009) (applying common-law principles to apportion statutory liability); see also *Leykis* v. *NYP Holdings, Inc.*, 899 F. Supp. 986, 990-991 (E.D.N.Y. 1995) (concluding that, because Section 630(b) "d[oes] not specifically state that an agent would be independently and individually liable," it authorizes suits against individuals only in their "official capacities for the purposes of respondeat superior liability"). In any event, the scope of the agent clause at the margins does not alter the fact that the clause clearly introduces an additional category of "employer."

B. The Statutory And Legislative History Confirm The Ordinary Meaning Of Section 630(b)

"Given the straightforward statutory command, there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). But if the Court were to do so, the history of the 1974 ADEA amendments and the accompanying legislative record both support a plain-text reading of Section 630(b).

1. Petitioner contends (Br. 43-49) that the ADEA should track Title VII, notwithstanding the critical textual differences between the two statutes, see pp. 11-13, *supra*, because both statutes "share common substantive features and also a common purpose." Br. 44 (quoting *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995)). "There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." *Lorillard*, 434 U.S. at 584. But there are also "significant differences," *ibid.*, which courts must give "careful and critical examination," *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 393 (2008).

In particular, the ADEA incorporates several key features of a different statute: the FLSA. The FLSA, which includes the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, also aims to eliminate employment discrimination. See, *e.g.*, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). And the ADEA's remedies and procedures derive from the FLSA. See 29 U.S.C. 626(b) (incorporating the "powers, remedies, and procedures" of 29 U.S.C. 211(b), 216, and 217); see also *Lorillard*, 434 U.S. at 584-585 (explaining that, as of 1978, "rather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures"). Originally, the Secretary of Labor, who enforces the FLSA, administered and enforced the ADEA as well; Congress transferred that authority to the EEOC in 1978. See Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1978 comp.); Exec. Order No. 12,144, 3 C.F.R. 404 (1979 comp.).

Particularly relevant here, the 1974 amendments that extended the ADEA to governmental employers were part of legislation that also expanded the FLSA's coverage. See FLSA Amendments § 28, 88 Stat. 74; see also *Kimel*, 528 U.S. at 68. That legislation extended the FLSA to "public agenc[ies]," regardless of size. FLSA Amendments § 6(a), 88 Stat. 58, 60; see 29 U.S.C. 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency."); see also *National League of Cities* v. *Usery*, 426 U.S. 833, 837-839 (1976) (describing 1974 FLSA amendments), overruled by *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Because the FLSA does not include a minimum-employee requirement, it is reasonable to infer that Congress similarly extended the

ADEA to governmental entities without imposing such a requirement. In that way, Congress achieved parity with the FLSA—not with Title VII.

Congress also achieved parity in the ADEA's treatment of covered governmental entities, whether state or federal. Although Section 630(b) excludes the United States from its definition of the term "employer," the 1974 amendments established a separate nondiscrimination provision applicable to the military, federal agencies, and certain other parts of the federal government. See FLSA Amendments § 28(b)(2), 88 Stat. 74. Congress provided that those federal entities "shall be made free from any discrimination based on age." *Id.* at 75; see 29 U.S.C. 633a(a) (Supp. IV 2016). It did not impose a minimum-employee requirement, just as it declined to do in its amendments to Section 630(b). See 29 U.S.C. 633a(a) (Supp. IV 2016); see also EEOC, *Compliance Manual, Threshold Issues*, § 2-III.B.1.a.i n.97 (May 12, 2000), https://www.eeoc.gov/policy/docs/threshold.html (*EEOC Compliance Manual*).

2. The legislative history of the 1974 amendments to the ADEA is sparse, but it likewise supports construing Section 630(b) to cover political subdivisions of any size.

In 1972, Senator Lloyd Bentsen introduced legislation to extend the ADEA to governmental employees. 118 Cong. Rec. 7745 (1972). Senator Bentsen believed that the existing exemption for governmental entities was "unsupportable," as "Federal, State, and local governments should be model employers." *Ibid.* But despite Senator Bentsen's entreaties, Congress did not amend the ADEA. Two months later, after it expanded Title VII's coverage, Senator Bentsen again proposed amending the ADEA. 118 Cong. Rec. 15,894. In so doing, he quoted the Title VII committee report, which

had stated that the "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy." *Id.* at 15,895 (citation omitted). Beyond that generic statement about extending the ADEA to governmental employees, however, Senator Bentsen never specifically mentioned the ADEA's minimum-employee requirement. And more to the point, Congress again declined to act.

The following year, the Senate Special Committee on Aging issued a working paper that laid the groundwork for amendments to the ADEA. See Senate Special Comm. on Aging, 93d Cong., 1st Sess., *Improving the Age Discrimination Law* (Comm. Print 1973). The working paper noted that "Federal, state and local government employers are not covered" by the ADEA and observed that it is "difficult to see why one set of rules should apply to private industry and varying standards to government." *Id.* at 17. The next paragraph discussed a proposal to lower the minimum-employee requirement from 25 to 20 employees. *Id.* at 18. And a final paragraph "urged that the law be extended * * * to include (1) Federal, State, and local governmental employees, *and* (2) employers with 20 or more employees." *Ibid.* (emphasis added). Contrary to petitioner's characterization (Br. 45), the working paper thus proposed two distinct extensions of coverage: one for governmental employers and one for employers with 20 or more employees.

In 1974, a new Congress amended the ADEA. See FLSA Amendments § 28, 88 Stat. 74. The relevant House Report treated the two ADEA amendments as independent. It noted that the legislation "[e]xtends

the provisions of the Age Discrimination in Employment Act to an employer with 20 or more employees. Also extends the provisions of the act to State and local governments and their related agencies." H.R. Rep. No. 913, 93d Cong., 2d Sess. 16 (1974); see *id.* at 40 (describing the legislation as amending the ADEA "to include within the scope of its coverage Federal, State, and local government employees * * * and to expand coverage from employers with 25 or more employees to employers with 20 or more employees"). It also described the amendment as "a logical extension of the committee's decision to extend FLSA coverage to Federal, State and local government employees." *Id.* at 40; see S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974) (same). Again, because the FLSA applies to governmental employers regardless of size, see 29 U.S.C. 203(d), the House and Senate Reports appear to envision similar coverage for the ADEA, to the extent they address the issue.

C. Canons Of Construction Do Not Require A Contrary Interpretation

Petitioner offers (Br. 36-43) two canons of construction as support for extending the 20-employee threshold to governmental entities. Neither canon applies here.

1. Petitioner first contends (Br. 37-40) that a plain-text reading of Section 630(b) would contravene the rule that Congress must speak clearly when altering the constitutional balance of federal and state powers. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 462 (1991). The issue in *Gregory* was whether an ambiguous exception to coverage of state employees in the ADEA extended to state judges. *Id.* at 464-467. The Court emphasized that the question touched on "the authority of the people of the

States to determine the qualifications of their most important government officials[,] an authority that lies at the heart of representative government." *Id.* at 463 (citation and internal quotation marks omitted). Because it was "at least ambiguous" whether state judges fell within the ADEA's exception for policymaking officials, *id.* at 467, 470, the Court concluded that the ADEA did not apply without a plain statement by Congress to that effect, *id.* at 470. That "plain statement rule * * * acknowledge[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

By its nature, the *Gregory* rule does not apply where a statute is clear, see 501 U.S. at 461; see also *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209-210 (1998), and here the ADEA's text unambiguously covers political subdivisions of any size, for the reasons already discussed. See pp. 8-21, *supra*. But in any event, the *Gregory* canon is a poor fit in this context. The ADEA clearly regulates States and their political subdivisions; the only question is whether Congress intended to regulate such entities with fewer than 20 employees. Petitioner does not explain why the choice among different numerical thresholds would "effect a significant change in the sensitive relation" between federal and state governments. *Bond* v. *United States*, 134 S. Ct. 2077, 2089 (2014); cf. *Wyoming*, 460 U.S. at 239 (explaining that the ADEA's application to state game wardens did not "directly impair the State's ability to structure integral operations in areas of traditional governmental functions") (internal quotation marks omitted). Moreover, the ADEA exposes state agencies only to limited liability, as States are immune from monetary damages in

ADEA suits brought by individuals. See *Kimel*, *supra*.[2] The application of the ADEA here thus bears little resemblance to its application in *Gregory*. At a minimum, the *Gregory* canon has no application in this specific case, which involves a local governmental entity. See *Jinks* v. *Richland Cnty.*, 538 U.S. 456, 466-467 (2003).

2. Petitioner next contends (Br. 40-43) that a governmental entity must qualify as a "person" subject to the 20-employee threshold to avoid constitutional concerns. Petitioner reasons (Br. 41) that if governmental entities constitute a separate category of covered employers, the ADEA would apply "even to state agencies and political subdivisions that have no effect on commerce," in potential violation of the Commerce Clause. To invoke the canon of constitutional avoidance, however, petitioner must identify both statutory language that "is susceptible of multiple interpretations" and "an interpretation that raises serious constitutional doubts." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). This case satisfies neither requirement.

Again, Section 630(b) is not ambiguous. In an attempt to generate ambiguity, petitioner asserts (Br. 41) that Congress typically "includes a Commerce Clause hook" when regulating public entities. But the two examples that petitioner offers in which federal statutes

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[2] States are not immune from ADEA suits brought by the EEOC. See, *e.g.*, *EEOC* v. *Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 179-180 (4th Cir. 2011); *EEOC* v. *Board of Supervisors for the Univ. of La. Sys.*, 559 F.3d 270, 272-273 (5th Cir. 2009). But suits brought by the federal government, as opposed to damages suits brought by individuals, do not similarly burden state sovereignty. See generally *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 72 (1996) (discussing Eleventh Amendment's limitation on "congressional authorization of suits by private parties against unconsenting States").

apply an express "interstate commerce" limitation to governmental entities include such a limitation because the governmental entities appear alongside private entities. See 42 U.S.C. 2000e(a)-(b) (defining "person" to include "one or more individuals, governments, governmental agencies, political subdivisions," and several private groups); 42 U.S.C. 12111(5) and (7) (defining "person" to have the same meaning as Title VII).[3] By contrast, where a statute independently addresses public entities, Congress ordinarily forgoes an express "interstate commerce" requirement. The FLSA, for example, covers "[e]nterprise[s] engaged in commerce," which it defines to include either an enterprise with "employees engaged in commerce or in the production of goods for commerce," or, without qualification, "an activity of a public agency." 29 U.S.C. 203(s)(1); see 29 U.S.C. 203(x). The Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, likewise covers "any 'public agency,'" without qualification. 29 U.S.C. 2611(4)(A); see 29 U.S.C. 2611(4)(B). Thus, Congress adhered to its ordinary practice in defining the governmental entities covered under the ADEA without reference to interstate commerce.

Nor does petitioner's novel Commerce Clause argument raise any "serious" constitutional concerns under the Court's existing Commerce Clause doctrine. *Jennings*, 138 S. Ct. at 836. This Court has squarely held that the ADEA's application to state and local governments represents "a valid exercise of Congress's powers under the Commerce Clause." *Wyoming*, 460 U.S.

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[3] Even those examples do not support petitioner's argument: Title VII further defines an "industry affecting commerce" to "include[] any governmental industry, business, or activity." 42 U.S.C. 2000e(h).

at 243. Although petitioner discusses (Br. 43) hypothetical "application[s]" of the ADEA to insular local entities, it makes no serious effort to address this Court's precedents evaluating a class of activity's effect on commerce "in the aggregate." *Gonzales* v. *Raich*, 545 U.S. 1, 19 (2005). Petitioner neither attempts to distinguish those cases nor asks the Court to depart from them.

II. THE APPLICATION OF THE ADEA WILL NOT THREATEN SMALL POLITICAL SUBDIVISIONS

Petitioner concludes (Br. 54-57) with a policy argument: that a plain-text interpretation of Section 630(b) "would have devastating effects on small state agencies and political subdivisions." Pet. Br. 54. The United States is sensitive to the needs of small political subdivisions, some of which, as petitioner explains (Br. 11), provide critical public services. But such considerations cannot justify disregarding clear statutory text. See *Lewis* v. *City of Chi.*, 560 U.S. 205, 215, 217 (2010). Moreover, the history of EEOC enforcement of the ADEA, the prevailing practice under state law, and other structural protections all indicate that petitioner's fears about small political subdivisions' survival are significantly overstated.

A. The EEOC has consistently taken the view that Section 630(b) defines "employer" to include political subdivisions of any size. Beginning more than 30 years ago, the EEOC has advanced that view in litigation. See *EEOC* v. *Hudson Twp.*, No. C85-2612A, 1986 WL 6479 (N.D. Ohio Mar. 13, 1986); EEOC Amicus Br. at 4-12, *Kelly* v. *Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986) (No. 85-2390); EEOC Br. at 3-15, *EEOC* v. *Monclova Twp.*, 920 F.2d 360 (6th Cir. 1990) (No. 89-4038). In 2000, the EEOC also issued policy guidance making clear that "[a] state or local government employer is

covered under the ADEA regardless of its number of employees." *EEOC Compliance Manual* § 2-III.B.1.a.i. Consistent with that longstanding position, the EEOC argued as amicus curiae in the court of appeals that the ADEA's 20-employee threshold does not apply to political subdivisions. See EEOC C.A. Br. 4-23.[4]

For decades then, the status quo outside the Sixth, Seventh, and Eighth Circuits (and, more recently, the Tenth Circuit) has been that the ADEA applies to small political subdivisions. The EEOC has accepted charges against such entities and has pursued enforcement actions where appropriate. Yet petitioner's dire predictions about the survival of small political subdivisions have not proved accurate. Indeed, this case arises from only the fifth appellate decision involving the ADEA's application to a small political subdivision since the ADEA was amended in 1974, and only the second appellate decision in the last 20 years. This Court's decision is thus unlikely to prompt a flood of litigation against small political subdivisions, as any floodgates have long remained open in most of the country.

B. One reason there has not been extensive litigation is that most small political subdivisions are subject to state age-discrimination laws. A majority of States prohibit political subdivisions of any size from discriminating on the basis of age, even though some of those

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[4] If Section 630(b) were ambiguous, the EEOC's longstanding, consistent position would warrant deference consistent with its "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14-16 (2011) (giving weight to EEOC's consistent position set forth in its compliance manual); *Holowecki*, 552 U.S. at 399 (same for EEOC guidance that had "been binding on EEOC staff for at least five years").

same States regulate only private employers of a certain size.[5] That common practice has not eliminated small political subdivisions in those States, as petitioner's own calculations reveal. See Pet. Br. 56 (estimating that over 12,000 political subdivisions employ fewer than 20 employees, based on data from Illinois); 775 Ill. Comp. Stat. Ann. 5/2-101(B)(1)(a) and (c) (West Supp. 2018) (defining "[e]mployer" to include "[a]ny person employing 15 or more employees within Illinois" or "any political subdivision * * * without regard to the number of employees"). Petitioner offers no reason to think that the uniform application of the ADEA to small political subdivisions will have any significant additional impact.

Moreover, the fact that many States prohibit small political subdivisions from discriminating based on age,

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[5] See Alaska Stat. § 18.80.300(5) (2016); Ark. Code Ann. §§ 21-3-201, 21-3-203 (2016); Cal. Gov't Code § 12926(d) (West 2018); Colo. Rev. Stat. § 24-34-401(3) (2017); D.C. Code § 2-1401.02(10) (2016); Haw. Rev. Stat. Ann. § 378-1 (LexisNexis 2016); Idaho Code § 67-5902(6) (West 2018); 775 Ill. Comp. Stat. Ann. 5/2-101(B)(1)(c) (West Supp. 2018); Ind. Code Ann. § 22-9-2-1 (LexisNexis 2010); Kan. Stat. Ann. § 44-1112(d) (Supp. 2016); Me. Rev. Stat. Ann. tit. 5, § 4553(4) (Supp. 2017); Mich. Comp. Laws Ann. § 37.2201(a) (West 2013); Minn. Stat. Ann. § 363A.03(16) (West 2012); Mo. Ann. Stat. § 213.010(8) (West Supp. 2018); Mont. Code Ann. § 49-2-101(11) (2017); Neb. Rev. Stat. Ann. § 48-1002(2) (LexisNexis 2012); N.J. Stat. Ann. § 10:5-5(e) (West Supp. 2018); N.D. Cent. Code § 14-02.4-02(8) (2017); Ohio Rev. Code Ann. § 4112.01(A)(2) (LexisNexis Supp. 2018); Okla. Stat. Ann. tit. 25, § 1301(1) (West Supp. 2018); Or. Rev. Stat. § 659A.001(4) (2017); 43 Pa. Stat. Ann. § 954(b) (West 2009); 28 R.I. Gen. Laws § 28-5-6(8)(i) (Supp. 2017); Tenn. Code Ann. § 4-21-102(5) (2015); Tex. Lab. Code Ann. § 21.002(8)(D) (West 2015); Utah Code Ann. § 34A-5-102(1)(i) (LexisNexis Supp. 2017); Vt. Stat. Ann. tit. 21, § 495d(1) (Supp. 2017); W. Va. Code Ann. § 5-11-3(d) (LexisNexis 2013); Wis. Stat. Ann. § 111.32(6)(a) (West 2018); Wyo. Stat. Ann. § 27-9-102(b) (2017).

even while some of those same States impose minimum-employee requirements for private employers, underscores the rationality of the scheme that Congress adopted. Numerous independent legislatures have concluded that governmental entities should be treated differently under anti-discrimination laws. They may have done so for reasons that the court of appeals surmised, including that small public agencies "can better bear the costs of lawsuits than small private-sector businesses or that government should be a model of nondiscrimination." Pet. App. 16a n.10; see 118 Cong. Rec. 7745 (1972) (Sen. Bentsen) (opining that public entities should be "model employers"). Or they may have concluded that, although intimate private working relationships should be protected from governmental regulation, that rationale does not extend to public employment. See Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 St. John's L. Rev. 1197, 1261-1262 (2006) (explaining interpersonal-relationship justification for Title VII's minimum-employee requirement). Regardless, a number of States have made the same policy decision that small political subdivisions should comply with anti-discrimination laws.

C. Finally, the application of the ADEA to small political subdivisions will not threaten their survival for several structural reasons. First, as previously noted, individuals may not sue States for money damages, blunting any financial impact on small state agencies or instrumentalities. *Kimel*, 528 U.S. at 91; see pp. 26-27 & n.2, *supra*.

Second, financial liability may not fall directly on the political subdivision that discriminates on the basis of age. For example, a small political subdivision may

form part of a larger county or state entity. See, *e.g.*, *Cink* v. *Grant Cnty.*, 635 Fed. Appx. 470, 474-475 (10th Cir. 2015) (treating small sheriff's office as part of county); *Parker* v. *Macon Cnty. Soil & Water Conservation Dist.*, No. 09-CV-2163, 2010 WL 105721, at *5 (C.D. Ill. Jan. 5, 2010) (finding genuine issue of material fact whether small water district was part of state agriculture department). Moreover, the vast majority of public entities participate in insurance pools that cover employment-discrimination lawsuits. See Karen Nixon, Pub. Agency Risk Sharing Auth. of Cal., *Public Entity Pooling—Built to Last* 3 (Dec. 16, 2011), www.cajpa.org/documents/Public-Entity-Pooling-Built-to-Last.pdf (noting that 85% of counties, townships, municipalities, school districts, and special districts participate in risk pools). And in the event that liability falls on the political subdivision itself, it may be able to seek the support of a county or State.

Third, Congress remains free to craft exemptions for entities that it perceives as particularly vulnerable or important. In fact, the ADEA already exempts certain employment actions by political subdivisions performing critical public services, such as fire or police districts. See 29 U.S.C. 623(j) (permitting political subdivisions "to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken * * * with respect to the employment of an individual as a firefighter or as a law enforcement officer," subject to various conditions); see also 29 U.S.C. 630(f) (excluding from the definition of "employee" elected officials, policymaking appointees, and certain staff members); 29 C.F.R. 1625.31 (exempting federal and state programs designed to encourage the employment of "persons with special employment problems").

Such exemptions confirm that Congress is aware of the particular challenges that certain governmental entities may face and is capable of addressing those challenges as they arise.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 29 U.S.C. 203(d) provides:

Definitions

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

2. 29 U.S.C. 623 provides in pertinent part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

* * * * *

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

* * * * *

3. 29 U.S.C. 630 provides in pertinent part:

Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, cor-

porations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

* * * * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees

subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

* * * * *

4. 29 U.S.C. 633a(a) (Supp. IV 2016) provides:

Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

5. 42 U.S.C. 2000e(a)-(b) provides:

Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

No. 17-587

IN THE
Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION AND NELA SUPPORTING RESPONDENTS AND URGING AFFIRMANCE

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STATEMENTS OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation litigate and file amicus briefs to address employment practices and other conduct that threaten the financial security and well-being of older Americans. In particular, they are active in trial and appellate matters nationwide seeking vigorous enforcement and proper interpretation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"). *See, e.g.*, *Ky. Ret. Sys.* v. *EEOC*, 554 U.S. 135 (2008) (AARP amicus brief supporting respondent and affirmance); *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (AARP amicus brief supporting petitioners and

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[1] Pursuant to the Court's Rule 37.6, amici state that this brief was not authored in whole or in part by any party or their counsel, and that no person other than amici, their members, or their counsel contributed any money that was intended to fund the preparation and submission of this brief. Pursuant to this Court's Rule 37.2(a), letters by both parties consenting to the filing of amicus briefs are on file with the Court.

reversal); *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996) (same); *Hoffmann-La Roche* v. *Sperling*, 493 U.S. 165 (1989) (AARP amicus brief supporting respondents and affirmance); *Taaffe* v. *Drake*, No. 2:15-cv-02870, 2016 U.S. Dist. LEXIS 57397 (S.D. Ohio, Apr. 29, 2016) (denying motion to dismiss ADEA action under *Ex parte Young*, 209 U.S. 123 (1908), seeking injunctive relief against state education administrators acting in their official capacity); *Harpham* v. *City of Dublin*, No. 2:12-cv-01069 (S.D. Ohio, Nov. 20, 2012) (complaint against municipality alleging violation of ADEA in the provision of health-related employment benefits).

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

This case addresses several issues of tremendous importance to amici and older workers they routinely represent. First, Petitioner Mt. Lemmon Fire District ("MLFD"), in seeking reversal of the Ninth Circuit's construction of Sections 630(a) and (b) of the ADEA, which define "employers" and "persons" covered by the Act, distorts settled principles of statutory construction articulated in this Court's prior decisions. Second, Petitioner, in trying to persuade this Court to adopt an identical reading of provisions of the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), mischaracterizes the Court's careful efforts, over more than five decades, to navigate similarities and differences between the texts, contexts, and histories of the ADEA, Title VII, and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et seq. ("FLSA"). Amici submit that principles stated in these diverse rulings, not a simplistic rule of conformity, should determine whether the two statutes' coverage-related definitions should be interpreted alike or not. Third, Petitioner greatly exaggerates potential adverse effects on small state and local public entities of having to comply with the ADEA.

Amici respectfully submit that this case presents an opportunity to correct a significant, longstanding error in the application of Sections 630(a) and (b) of the ADEA. Several circuit courts, following *Kelly* v. *Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986), have failed to recognize key differences between the text of the ADEA and Title VII and, thus, in their coverage of small public entities. This unduly restrictive reading of the ADEA has for decades denied

redress under federal age discrimination law for many thousands of employees of small political subdivisions in those jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court frequently has had occasion to discuss the 1974 amendment to the ADEA, enacted as Section 28 of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974) ("1974 Act"). *See, e.g., Gomez-Perez* v. *Potter*, 553 U.S. 474, 489 (2008) (upholding retaliation claims under the broad prohibition of "discrimination" in the ADEA's federal sector provision, § 633a, added by the 1974 Act); *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 68 (2000) (recognizing 11th Amendment limits to the ADEA's application to state employers, another feature of the 1974 Act). Yet, this case addresses, for the first time, the precise question of the size of state and local government "employers," in terms of numbers of employees, covered by the 1974 Act.

Petitioner MLFD displays considerable creativity in construing the 1974 Act not to cover small state and local government entities. But in doing so, MLFD sacrifices fidelity to this Court's careful parsing of the ADEA over the past half century, consistent with settled principles of statutory construction and with indicia of the ADEA's status as "a hybrid" of the FLSA and Title VII. *McKennon* v. *Nashville Banner Publ. Corp.*, 513 U.S. 352, 357 (1995) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 578 (1978)).

Respondents John Guido and Dennis Rankin secured from the Equal Employment Opportunity Commission ("EEOC") rare findings of "reasonable cause to believe the Fire District violated the [ADEA]," Pet. App. 3a, by terminating them in 2009, at ages 46 and 54, *id.* 20a n.3, respectively, and replacing them with younger employees, including a 28-year-old. Pls. Rule 56.1 Statement of Facts ¶ 33. Guido and Rankin had worked for MLFD since 2000, "served as full-time firefighter Captains," Pet. App. 3a, and established favorable work records, Pls. Rule 56.1 Statement of Facts, ¶¶ 6-11, 13-14, 24.

An Arizona federal district court declined to consider the former firefighters' claims of age bias on their merits. Instead, the court dismissed the suit on summary judgment because the MLFD had fewer than twenty employees during the relevant years (2008 and 2009) and, thus, the court concluded, MLFD was not an "employer" covered by § 630(b) of the ADEA. Pet. App. 26a. The Ninth Circuit reversed, ruling that § 630(b) does not impose a minimum-employee threshold for non-federal public entities, but covers such entities of all sizes. *Id.* 17a. This Court granted certiorari to resolve the Ninth Circuit's disagreement with other Courts of Appeals that have addressed whether the ADEA has a minimum-employee threshold for covered state and local public employers.

ARGUMENT

I. UNDER SETTLED STATUTORY CONTRUCTION PRINCIPLES, SECTION 630(b) OF THE ADEA APPLIES TO NON-FEDERAL PUBLIC EMPLOYERS REGARDLESS OF THE NUMBER OF EMPLOYEES THEY HAVE.

An "employer" to whom ADEA prohibitions apply:

> means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

29 U.S.C. § 630(b). The question before the Court is whether the "twenty-employee minimum" identified in § 630(b)'s first sentence, which encompasses private-sector employers, "also applies to a 'political subdivision of a State,'" Pet. App. 5a, the subject of the latter numbered clause of § 630(b)'s second sentence. The Court of Appeals held it unambiguously does not.

Id. 17a. MLFD contends otherwise. Amici submit that the Ninth Circuit was right and MLFD is in error.[2]

A. The plain text of Section 630(b) unambiguously covers all non-federal public employers.

It is well-settled that "when the statutory language is plain," this Court "must enforce it according to its terms." *Millbrook* v. *United States*, 569 U.S. 50, 57 (2013). *See also* Pet. App. 5a n.1 ("If the 'statutory text is plain and unambiguous[,]' we 'must apply the statute according to its terms.'") (quoting *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009)). Indeed, for over a century this Court has reaffirmed that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms," *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2009) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (in turn quoting

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[2] MLFD also claims that failing to read a minimum-employee coverage criterion for non-federal public entities implies: (i) that such entities are not subject to the "agent" clause of the second sentence and, thus, are not subject to respondeat superior liability for misconduct of their agents; and (ii) that they are not subject to the "affecting commerce" language of the first sentence and, thus, may be constitutionally barred from ADEA liability. Amici agree with Respondents that these claims are unfounded, but do not address them further. In addition, the parties suggest that personal liability for certain individual "agents" of covered "employers" is consistent with Respondents' reading of § 630(b). Amici concur. However, such questions were not addressed below and, thus, should not be decided in this case.

United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (and in turn quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

The admonition to honor the plain meaning of unambiguous statutory text is particularly relevant where, as here, a court is invited "to read [a specific] limitation [appearing in "neighboring provisions"] into unambiguous text" that does not contain the desired limiting language. *Millbrook* v. *United States*, 569 U.S. at 57. MLFD asks this Court to conclude that the text of § 630(b) is ambiguous and, accordingly, to reach far beyond "its terms"—to examine alleged implicit meanings and vaguely stated legislative intentions—and then to read into its second sentence a non-existent twenty-employee limitation appearing in the first. The Court should reject this request to construe § 630(b) contrary to its terms and unambiguous meaning.

For the reasons set forth above and in Respondents' opening brief, the Court should affirm the Ninth Circuit's holdings that "the meaning of § 630(b) is not ambiguous," and that "there is no valid justification to depart from the plain meaning" of § 630(b). Pet App. 14a.

B. The enactment history of the ADEA, and of Section 630(b) in particular, confirm that the ADEA covers non-federal public employers of all sizes.

Given the indicia that § 630(b)'s meaning is unambiguous, Petitioner has a heavy burden to justify a wider inquiry. In such circumstances, restraint is required: "We have to read [the ADEA] the way Congress wrote it." *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 102 (2008) (rejecting policy-based arguments purporting to trump clear textual evidence that the ADEA's "reasonable factors other than age" provision, 29 U.S.C. § 623(f)(1), creates an affirmative defense to disparate impact liability, for which employers bear the burden of proof). *See* Pet. App. 15a (citing *Meacham*, 554 U.S. at 102).

Putting aside for the moment Petitioner's novel approaches to construing the ADEA's text (*see* Section I.C. below), it is instructive to examine the Court of Appeals' approach to extra-textual sources. The Ninth Circuit focused on text, rather than less definitive evidence of Congress's intent in crafting § 630(b). That is, the Court of Appeals looked to "the parallel [1972] amendment to Title VII," Pet App. 15a, which amended Title VII to extend its coverage to federal and non-federal public entities. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) ("1972 Act"). Comparing the 1972 Act to the 1974 Act, the Ninth Circuit sensibly observed:

> Congress used different language in the 1974 ADEA Amendment, which changes the ADEA's meaning relative to Title VII, and such Congressional choice must be respected. *See Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, [570 U.S. 338, 353] (2013). If Congress had wanted the 1974 ADEA Amendment to achieve the same result as the 1972 Title VII Amendment, it could have used the same language.

Pet. App. 15a.[3] The Court of Appeals' citation to *Nassar* references this Court's decree therein that "[j]ust as Congress' choice of words is presumed to be deliberate, so too are its structural choices. *See* [*Gross* v. *FBL Fin. Servs. Inc.*], 557 U.S. [167,] 177 n.3 [(2009)]." 570 U.S. at 353. *Nassar* thereby relied on *Gross*'s reasoning, equally applicable here, that "giv[ing] effect to Congress'[s] choice" is the proper course when "Congress [has] amended Title VII . . . but did not similarly amend the ADEA." 557 U.S. at 177 n.3.[4]

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[3] In the 1972 Act amending Title VII, Congress defined "[t]he term 'person'" expressly to "include[] one or more individuals, *governments, governmental agencies, political subdivisions* . . . ," and in the next subsection, defined "[t]he term 'employer' [to] mean[] a person engaged in an industry affecting commerce who has fifteen or more employees . . . ." 42 U.S.C. § 2000e(a), (b) (emphasis supplied). In contrast, the ADEA's definition of "person" contains no reference to governmental entities. *See* 29 U.S.C. § 630(a).

[4] In *Gross* and *Nassar*, the Court also spoke of the Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1079 (1991), in which Congress amended both the ADEA and Title VII to different effect. And "as the Court has explained, 'negative implications

In contrast, the Court of Appeals properly gave much less credence to bits and pieces of legislative history that "did not address the specific question before us" and "never state[d] that the twenty-employee minimum should apply to political subdivisions." Pet. App. 16a. (discussing "a Senate report written a year before the bill was passed," a later "House report," and "two floor statements," one of them from 1972, purporting to convey Congress's intent in 1974 that "the same rules apply" to public and non-public employers). The Ninth Circuit concluded that such "vague language" was inadequate to "override the plain meaning of [§ 630(b)]." *Id.*

The same reasons caused the Court of Appeals to appropriately criticize the Seventh Circuit in *Kelly v. Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986), for being "led . . . astray" by a "focus on divining congressional intent, rather than determining the ordinary meaning of the text" and, as a result, concluding that § 630(b) is ambiguous and susceptible to a reading whereby all employers with fewer than 20 employees are exempt from coverage. Pet. App. 15a. This Court likewise should determine that in this instance, it "need not read minds to read text." *Id.*

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raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.' *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)." *Gross*, 557 U.S. at 168. But it is surely also compelling evidence of § 630(a)'s meaning that in 1974 Congress amended the ADEA to extend coverage to federal and non-federal public entities, quite like it did in 1972 to Title VII, yet only in Title VII did Congress specifically limit coverage of state and local public entities to employers with a minimum number of employees.

Kelly's superficial analysis of the 1972 Act, which Petitioner wisely does not champion, undermines the notion that four circuit court decisions "rely[ing] entirely on *Kelly*'s reasoning" amounts to "a powerful rebuttal" to the plain text of § 630(b). Pet. App. 11a. For instance, the *Kelly* court was utterly at odds with this Court's statutory construction jurisprudence when it mused that "[j]ust because the language of a subsequent statute [the 1974 Act] is not identical to the earlier statute on which it was modeled [the 1972 Act], we do not necessarily assume that Congress intended to change the meaning." 801 F.2d at 272. On the contrary, as *Nassar* and *Gross* testify, such differences in text, particularly in regard to provisions in related statutes having a similar overall purpose, should be presumed intentional.[5]

Kelly also stumbled in finding the history of the Fair Labor Standards Amendments of 1974 to be barren of "any reason for the different language" in § 28, amending the ADEA, in contrast to the 1972 Act, amending Title VII. *Id.* On its own, the title of the law including and giving life to § 28 is highly suggestive. And the fact that in 1974, Congress contemporaneously extended to all public entities the FLSA protections that previously applied to private employers of all sizes is still more powerful evidence that Congress had the same goal in mind when it

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[5] Moreover, "a change in the language of a prior statute presumably connotes a change in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 256 (2012).

adopted "different language" in amending the ADEA, than it did in 1972, in amending Title VII.

The Seventh Circuit also failed to discuss the report of the House Committee on Education and Labor accompanying the text that, with minimal changes, President Nixon ultimately signed into law as the 1974 FLSA (and ADEA) amendments. H.R. Rep. No. 93-913 (1974). That report described the extension of ADEA coverage to public entities as a "logical extension of the . . . decision to extend FLSA coverage to Federal, state and local governmental employees." *Id.* at 40.[6] And it is undisputed that the 1974 Act extended the FLSA to cover public employers of all sizes. *See* 29 U.S.C. § 203.

Petitioner likewise ignores the FLSA, while selectively addressing the supposed statutory context in which the ADEA has evolved, as "part of a trio of

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[6] The report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 93-690, at 55 (Feb. 22, 1974) (to accompany S. 2747, the Fair Labor Standards Amendments, 93rd Cong. introduced Nov. 27, 1973), contains identical language. The Senate committee report further cemented the connection between the FLSA and the 1974 Act's extension of coverage to public employers in § 630(b), stating: "The Committee recognizes that the omission of government workers from the [ADEA] did not represent a conscious decision by the Congress to limit the ADEA to employment in the private sector. It reflects the fact that in 1967, when ADEA was enacted, most government employees were outside the scope of the FLSA and the Wage Hour and Public Contracts Divisions of the Department of Labor, which enforces the [FLSA], were assigned responsibility for enforcing the [ADEA]." *Id.*

. . . statutes," including Title VII and the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12101, et seq. (1990) ("ADA"). Pet. Br. at 44. Petitioner's presentation cites passages from *McKennon* and *Lorillard*, conveniently ignoring that both describe the ADEA as "something of a hybrid" between Title VII and the FLSA. *McKennon*, 513 U.S. at 357 (citing *Lorillard*, 434 U.S. at 578).[7] Certainly the FLSA is a better reference point than the ADA, which Congress did not enact until sixteen years after the 1974 amendment to the ADEA.

C. No valid basis exists for the assertion that Section 630(b)'s first sentence covers local political subdivisions and that its second sentence merely clarifies the first.

Petitioner's construction of § 630(b) is novel and untethered to precedent or traditional methods of statutory analysis. Respondents present compelling rebuttals to many of Petitioner's theories. Yet a few other significant defects in the case against applying the ADEA to MLFD are worthy of the Court's attention.

The crux of Petitioner's case is that "statutory context can overcome the ordinary . . . meaning" of the

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[7] This is a sufficient basis, together with the House and Senate report passages noted above, to ignore the Seventh Circuit's misguided conclusion, which Petitioner also does not endorse, that "Congress's intent in amending the FLSA has no bearing on the interpretation of section 630(b)." *Kelly*, 801 F.2d at 271 n.2.

ADEA. Pet. Br at 34. Petitioner builds an elaborate superstructure of "context" founded on the proposition that the words "organized groups of persons" within the term "person" in § 630(a) has always included governmental entities, to whom § 630(b)'s employee-minimum, in the definition of "employer," applies. Section 630(b)'s remaining text, referring to agents and non-federal public entities, Petitioner continues, is merely "clarifying."

One appropriate response to this contorted reading of the plain text of § 630(a) and (b)—especially given Congress's straightforward expansion of Title VII in 1972 by adding words describing public entities to the definition of "person"—is to recall the Court's conclusion in analogous circumstances that "[g]iven this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Nassar*, 570 U.S. at 353 (citing *Gardner* v. *Collins*, 27 U.S. 58, 2 Pet. 58, 93, 7 L. Ed. 347 (1829) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words")); *see also Ky. Ret. Sys.* v. *EEOC*, 554 U.S. at 151 ("the most straight forward reading of the [ADEA] is the correct one") (Kennedy, J. dissenting).

Petitioner's counterintuitive interpretation of the term "person" is not actually consistent with any of the circuit decisions MLFD invokes. *Kelly* and the two circuit decisions relying on it do not discuss this

theory at all.[8] And *Cink* v. *Grant Cty.*, 635 Fed. App'x 470 (10th Cir. 2015), is at best opaque on this point.

Petitioner misleads by citing *Cink*, 635 Fed. App'x at 472 n.4, as "explicitly h[o]ld[i]ng that 'persons' must be read to 'include political subdivisions.'" Pet. Br. 25. Yet, *Cink* merely asserts, incorrectly, without analysis or explanation, that as "to employer status under the ADA, ADEA and Title VII [,] [t]here are no material differences in these statutes for our purposes. All refer broadly to a 'person' (specified, or judicially interpreted, to include political subdivisions) . . . ." *Id.* Neither *Cink* nor Petitioner provides any such "judicial interpret[ation]" of the term "person" as encompassing state and local subdivisions under the ADEA.[9]

Petitioner also misfires in trying to enlist the text of § 630(c) in its cause. *See* Pet. Br. at 22-23. Section 630(c) defines "employment agenc[ies]" subject to ADEA liability. These are "persons" recruiting potential employees for "employers." Petitioner fastens on § 630(c)'s exclusion of federal entities; to require exclusion, they must otherwise be included in "persons" and, what's more, state and local governments also must be within the definition. Yet, § 630(c) establishes such ADEA-covered entities

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[8] *Palmer* v. *Ark. Council on Econ. Educ.*, 154 F.3d 892 (8th Cir. 1998); *EEOC* v. *Monclova Twp.*, 920 F.2d 360 (6th Cir. 1990).

[9] Petitioner also misrepresents brief discussions of the term "employer" in *Palmer*, *Monclova* and *Kelly* as endorsing its elaborate theory, simply because the "definition [of "employer"] centers on 'persons.'" Pet. Br. at 25.

without imposing a minimum employee limit. Hence, if anything, § 630(c) supports Respondents' reading of § 630(b), because § 630(c) creates a class of ADEA-covered "persons" that can be liable in that capacity, regardless of how many employees they have. Petitioner's attempt to draw a meaningful parallel between § 630(b) and (c) falls flat. Even if Petitioner is right that non-federal government employment agencies are "persons," Pet Br. at 23, this does Petitioner no good. The only "employers" subject to a twenty-employee minimum by § 630(b) are described in a different sentence than the sentence describing non-federal public employers. And there is no reference in § 630(c) to non-federal entities at all.

II. HAVING DECIDED THAT THE ADEA IS A "HYBRID" OF THE FLSA AND TITLE VII, THE COURT SHOULD CONSTRUE SECTION 630(b) BASED ON THE FLSA'S CLOSELY RELATED TEXT AND CONTEXT, NOT ON A NOTION THAT THE ADEA AND TITLE VII REQUIRE CONSISTENT INTERPRETATION.

A central, errant theme of Petitioner's argument is that special rules of presumptive conformity and consistency envelop federal employment discrimination laws and dictate this case's outcome. MFLD contends that were this Court to ascribe meaning to an ADEA "employer" that differs from the meaning of that term under Title VII's plainly differing text, it would create troubling "tension with comparable antidiscrimination laws," Pet. Br. at 5-6, "inexplicable disparities in the ADEA's

treatment of public and private employers," *id.* at 16, and, indeed, would cause the ADEA to "bear no resemblance to" other federal employment bias laws' treatment of employers "in the public sector—even as it closely tracks them in the private sector," *id.*

This recitation of horribles sounds a false alarm. It wholly mischaracterizes the nuanced nature of the Court's exegesis of ADEA provisions over the past half century. Rather than mechanically applying rigid presumptions, this Court has carefully parsed the two principal influences on the ADEA's text, i.e., the FLSA and Title VII. The diverse results of these assessments favor a similar approach here. No artificial rule of thumb should divert the Court from recognizing what statutory construction canons and the 1974 Act's context show: strong parallels between FLSA and ADEA coverage of public entities and distinct ADEA and Title VII meanings of the term "employer."

A. This Court has repeatedly rejected the notion that corresponding provisions of the ADEA and Title VII must have identical meaning, especially where, as here, parallels with the FLSA are compelling.

The ADEA's FLSA origins are a critical motif in this Court's ADEA decisions over the years. That theme is highly relevant here, yet, decidedly inconsistent with Petitioner's objections to deviating from Title VII's model.

While *Lorillard* states that the ADEA and Title VII share similar "aims—the elimination of discrimination"—and, further, that the ADEA's prohibitions "were derived in haec verba from Title VII," 434 U.S. at 584, the overwhelming focus of *Lorillard* is that, with respect to jury trials, the ADEA must be construed like the FLSA, not Title VII. *Id.* at 585. In reaching that result, this Court stressed that the ADEA explicitly declares that it "be enforced in accordance with the 'powers, remedies, and procedures'" of the FLSA. *Id.* at 580 (citing § 7(b) of the Act, 29 U.S.C. § 626(b)); *see also Hoffman-LaRoche* v. *Sperling*, 493 U.S. 165, 167 (1989) (same). Further, the Court observed that in 1967, "Congress exhibited . . . a detailed knowledge of the FLSA provisions and their judicial interpretation," *id.* at 581, and also "selectivity . . . in incorporating . . . FLSA practices [that] strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Id.* at 582.

Hence, in *Lorillard*, this Court refused to preclude a right to a jury trial in private civil actions for lost wages under the ADEA simply because Title VII did not provide such a right. *Id.* at 577, 582, 585. Rather, the Court found "[f]ollowing the model of the FLSA'[s]" enforcement mechanisms to be the logical course. *Id.* at 579. The Court expressed no regret about causing "tension" between "sister" statutes, or reducing their "resemblance" to one another. *See* Pet. Br. at 5-6, 16. On the contrary, the Court described the "petitioner's argument by analogy to Title VII

unavailing" and its reflexive "reliance on Title VII . . . misplaced." 434 at 584, 585.

In extending ADEA coverage to public entities as part of the 1974 FLSA amendments, Congress was just as mindful of the FLSA's text and its implications, and just as selective in incorporating FLSA practices as in 1967. *See Kimel* v. *Fla. Bd. of Regents*, 528 U.S. at 68, 76-78 (describing the 1974 Act as "a statute consisting primarily of amendments to the FLSA" and discussing in detail related provisions of the 1974 Act amending both the ADEA and FLSA and "mak[ing] it more than clear that Congress understood the consequences of its actions" in doing so). Hence, the same conclusion as in *Lorillard* is warranted here. That is, absent any specific, explicit textual or other evidence that Congress intended to deviate from FLSA coverage practices—i.e., including public employers of all sizes—such intent should not be imputed.

Finally, in considering how to construe ADEA text that, as here, does not fall neatly into either the category of the Act's "prohibitions" or, rather, its "powers, remedies, and procedures," this Court has looked to *both* the FLSA and Title VII. Thus, in *McKennon* v. *Nashville Banner Publ. Corp.*, the Court noted, in assessing proper remedies for after-acquired evidence of wrongdoing under the ADEA, that a private right of action is a "vital element found in both Title VII and the Fair Labor Standards Act." 513 U.S. at 358.[10]

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[10] In still other circumstances, the Court has looked beyond both the FLSA and Title VII to discern the proper meaning of the

B. This case is like others where the Court has diverged from Title VII in construing the ADEA and, further, is distinguishable from instances where the Court has adopted the same reading of both laws.

This Court has construed the ADEA and Title VII in parallel in some appropriate instances, but more often than not, it has declined to do so, stressing the importance of subtle distinctions between these and other employment discrimination laws. *See, e.g.*, *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 393 (2008) (noting that "EEOC enforcement mechanisms and statutory waiting periods for ADEA claims differ in some respects from those pertaining to other statutes the EEOC enforces, such as Title VII . . . and the [ADA]" and, hence, "[w]hile there may be areas of common definition, . . . counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."); *accord Gross*, 557 U.S. at 174 ("when conducting statutory interpretation," the Court must exercise the same kind and degree of care).

Petitioner ignores the fact that the Court's decisions construing the ADEA and Title VII in tandem have addressed situations quite unlike this

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ADEA. *See, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 479-88 (2008) (considering decisions of the Court under Title IX of the Higher Education Amendments of 1972, 20 U.S.C. §§ 1681-88, and 42 U.S.C. § 1981 in determining whether retaliation claims are encompassed within the prohibition of "discrimination" in the ADEA's federal sector provision, 29 U.S.C. § 633a).

case. For instance, in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), the Court held that in at least two respects, § 14(b) of the ADEA, 29 U.S.C. § 633(b), and § 706(c) of Title VII, 42 U.S.C. §2003e-5(c), should be read in pari materia, since the former "is almost in haec verba with" the latter and "since the legislative history of § 14(b) indicates that its source was § 706(c)." *Id.* at 756.[11] The Court dismissed the respondents' pleas to recognize minor differences in language in the two provisions, and another minor difference suggested by § 14(a) of the ADEA, 29 U.S.C. § 633(a), "for which Title VII has no counterpart." *Id.* at 757. But *Evans* is of no help to Petitioner, given the nearly identical language of the provisions at issue in that case, and also because, in regard to the second issue in *Evans*, the EEOC, unlike here, favored parallel readings of the ADEA and Title VII to which the Court declared "great deference" was due. *Id.* at 761.

The Fire District's challenge also is distinctly at odds with other instances in which the Court has favored parallel readings of the ADEA and Title VII. In particular, in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), and *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Court treated the task of "mak[ing] out a prima facie case of age discrimination" under

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[11] On this basis, the Court held that "prior resort to appropriate state proceedings is required" under these provisions in both Title VII and the ADEA order "to screen from the federal courts . . . complaints that might be settled . . . in state proceedings." *Id.*

McDonnell Douglas Corp. v. *Green*, 411, U.S. 792 (1973) as indistinguishable from doing so in a Title VII case. *Thurston*, 469 U.S. at 121; *Reeves*, 530 U.S. at 140-41; *see also Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 416-17 (1985) (considering, in construing the ADEA's "bona fide occupational qualification" defense, 29 U.S.C. § 623(f)(1), "the parallel treatment of such questions under Title VII," *see* 42 U.S.C. § 2000e-2(e)(1)). In these cases, as in *Evans*, the identical or nearly identical language in the ADEA and Title VII justified parallel treatment. This case, however, presents no such identicality.

In a further striking contrast to this case, the Court in several instances has construed nearly identical language in the ADEA and Title VII quite differently. Over two decades ago, in *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996), Justice Scalia announced, for a unanimous Court, that Title VII's prima facie case framework—insofar as it requires replacement of a claimant in a protected class by someone outside that class—was too rigid for the ADEA, whose protected class consists of persons at or over age 40. *Id.* at 312-13 ("Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case."). By allowing ADEA cases to go forward in circumstances such as a 56-year-old claimant replaced by a 40-year-old, rather than only by someone 39 or under, *O'Connor*, like the Ninth Circuit decision here, recognized broader ADEA coverage than is afforded by Title VII.

The Court also rejected a simplistic rule of conformity with Title VII in *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581 (2004). There "the Court declined to interpret the phrase 'because of . . . age' in 29 U.S.C. § 623(a) to bar discrimination against people of all ages, even though the Court had previously interpreted 'because of ... race [or] sex' in Title VII to bar discrimination against people of all races and both sexes." *Gross*, 557 U.S. at 175 n.2.

In 2009 *Gross* cited *Cline* as a chief example of the principle, directly contrary to Petitioner's theory of this case, that "the Court's approach to interpreting the ADEA in light of Title VII has not been uniform." *Id.* *Gross* also construed the nearly-identical "because of" wording in both laws differently. It endorsed "but-for" causation under the ADEA, as opposed to a "motivating factor" standard in Title VII disparate treatment cases. *Id.* at 167-168. Critical to this judgment was the fact that non-conforming amendments to both statutes (in the Civil Rights Act of 1991) resulted, as here, in significant "textual differences between Title VII and the ADEA." *Id.* at 175 n.2. Still further, *Gross* declined to apply to the ADEA the Court's prior reading—in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989)—of parallel text in Title VII pre-dating the 1991 amendment. *Gross*, 557 U.S. at 178 ("reject[ing] petitioner's contention that our interpretation of the ADEA is controlled by *Price Waterhouse*").

This Court's ADEA decisions interpreting similar language in the ADEA and Title VII—not to mention those interpreting significantly different text,

as here—alleviate any concerns that construing § 630(b) according to its terms would "put the ADEA out of sync with other anti-discrimination statutes." Pet. Br. at 43.

C. Contrary to the rigid theory of consistent construction Petitioner advances, the Court has employed a nuanced approach when interpreting divergent text that serves like aims in the ADEA and Title VII.

The decisions in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), and *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), provide a template for the critical challenge posed in this case: reconciling, on the one hand, reasons to interpret the ADEA in light of similar purposes and prohibitions in Title VII, and on the other hand, divergent statutory text and statutory history.

Above all, *Smith* and *Meacham* reflect this Court's commitment to "careful and critical examination" of statutory parallels. *Gross*, 557 U.S. at 174. Thus, both decisions honor relevant ADEA linkages to Title VII, while avoiding the rigid consistency Petitioner here espouses.

Smith upheld a "presum[ption] that Congress intended . . . text to have the same meaning in both statutes" when "Congress uses the same text in two statutes having similar purposes." 544 U.S. at 233. On this basis, the Court declared that the "unanimous

interpretation of . . . Title VII in *Griggs* [v. *Duke Power Co.*, 401 U.S. 424 (1971)]," as authorizing a disparate impact claim, was "therefore a precedent of compelling importance" in establishing disparate impact as a theory of liability under the ADEA. *Id.* at 234. The *Smith* Court also "g[o]t help from [the Court's] prior reading of . . . *Ward's Cove* [*Packing Co.* v. *Atonio*, 490 U.S. 642 (1989)] . . . that a[n ADEA] plaintiff [likewise] falls short by merely alleging a disparate impact, or 'point[ing] to a generalized policy that leads to such impact.'" *Meacham*, 554 U.S. at 100 (citing *Smith*, 544 U.S. at 241).

Yet *Smith* focused as well on the key textual disparities between Title VII and the ADEA: the "reasonable factors other than age" clause, 29 U.S.C. § 623(f)(1), and the amendment to Title VII (but not the ADEA) vitiating *Ward's Cove*. 544 U.S. at 240. Furthermore, *Meacham* applied "FLSA default rules placing the burden of proving an exemption on the party claiming it," 554 U.S. at 93, and rejected further application of *Ward's Cove* to override the FLSA's relevance to construction of the ADEA, *id.* at 98-99.

The Court's attention to details of statutory history and context in both *Smith* and *Meacham* likewise clash with Petitioner's claim, at the end of its brief, that "[i]f anything, one would expect Title VII's coverage to be uniformly broader than coverage under the ADEA." Pet. Br. at 48. The Court's reasoning in *O'Connor*, *Cline*, *Gross* and *Holowecki* reflect a far more nuanced approach.

Petitioner also alleges that since "Title VII's coverage in the private sector is broader than the ADEA's"—presumably referencing the Acts' different employee minimums, 15 versus 20—it follows that "'the problems addressed by Title VII' are 'more serious than the problem of age discrimination,'" and, accordingly, that it would be "puzzling" for the ADEA to afford more protection than Title VII "in the public sector." Pet. Br. at 49 (citing *Kelly*, 801 F.2d at 273, in turn citing *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1983)). Yet, no ruling of this Court has made such a crude comparison of the "serious[ness]" of age and other bias. To be sure, *Wyoming* said that age bias usually has a different *source*, as it "rarely [i]s based on" sheer animus and, rather, usually stems from stereotypes (also no doubt a rich source of race and sex bias). *Id.* at 230-231. But *Wyoming* also said that age bias is "profoundly harmful" as "it inflict[s] on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations." *Id.* This is so despite the ADEA's omission, thus far, of a specific remedy for psychological harm, unlike Title VII and most other federal civil rights laws.

D. The Court's comparisons of the ADEA'S public and private sector provisions have not embraced the rigid consistency urged by Petitioner.

The Court's decisions in *Gomez-Perez* and *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), offer another lens for assessing Petitioner's claim that the

ADEA's different treatment of public and private employer coverage, in terms of applying an employee-minimum, violates the principle of equal treatment of public and private employers. Both decisions rejected comparisons with the ADEA's private sector provisions as a basis for a more restrictive interpretation of the Act's federal sector provisions. The same approach is warranted in regard to the ADEA's state and local government coverage provisions enacted in 1974.

When U.S. postal worker Myrna Gomez-Perez sought to bring an ADEA retaliation claim, the Court rejected her employer's argument that the Act's federal sector provision, 29 U.S.C. § 633a, contained no specific reference to a prohibition against retaliation, unlike the Act's private sector provision, 29 U.S.C. § 623(d). 553 U.S. at 486. The Court ruled that the term "discrimination" in the Act's federal sector provision encompassed a retaliation claim. *Id.* at 488. *Gomez-Perez* also rejected Petitioner's suggestion that an abstract principle of parallel construction should trump concrete evidence of statutory meaning, including specific evidence of statutory history. *See* Pet. Br. at 46 ("The Ninth Circuit's reading creates disparities in the ADEA's treatment of public and private employers that Congress could not possibly have intended."). That is, the Court declared, "because §§ 623(d) and 633a were enacted separately and are couched in very different terms, the absence of a federal sector provision similar to § 623(d) does not provide a sufficient reason to" impute congressional purpose to exclude coverage of

retaliation from § 633a. *Gomez-Perez*, 553 U.S. at 488.[12]

Congress also enacted the first and second sentences of § 630(b) separately, in 1967 and 1974. And in the former it included an express employee minimum, while in the latter it did not. It follows, based on *Gomez-Perez*, that there is no basis for inferring a congressional purpose to similarly limit ADEA coverage of small non-federal public entities.

III. CONGRESS'S CHOICE TO APPLY THE ADEA'S PROTECTIONS TO STATE AND LOCAL PUBLIC ENTITIES OF ALL SIZES POSES NO SERIOUS DANGER TO THE SURVIVAL OF SMALL POLITICAL SUBDIVISIONS.

Petitioner grossly overstates the likely impact on small public agencies, including "special districts" like MLFD, of reading § 630(b) according to its terms. The ADEA applies to many such entities in any case

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[12] *Lehman* further undermines Petitioner's prayer for identical interpretation of differently worded amendments to the ADEA and Title VII enacted two years apart. The *Lehman* Court ruled that *contemporaneous*, different textual treatment of public- and private-sector entities required such differences to be honored, not ignored. *Gomez-Perez*, 553 U.S. at 486 n.2 ("The situation here is quite different from that . . . in *Lehman* . . . where both the private and federal-sector provisions of the ADEA already existed and a single piece of legislation—the 1978 Amendments to the ADEA—added a provision conferring a jury-trial right for private-sector . . . suits but [not] for federal sector suits.").

due to agency principles which align the liability of small public agencies with larger entities like counties in which they operate. Moreover, the history of other major federal civil rights laws that cover public entities of all sizes gives no cause for concern about "devastating effects" or "crushing" legal expenses. Pet. Br. at 54. Further, however this case resolves, the vast majority of small public subdivisions already are subject to state age discrimination laws, most of which provide complainants with much more robust monetary remedies than does the ADEA. In short, exposure to ADEA liability for small public entities is a valid concern, but is not a sound basis for ignoring § 630(b)'s plain text and indicia of Congress's intent to cover public employers of all sizes.

A. The ADEA covers many small public subdivisions due to their agency relations with another public entity.

The definition of an "employer" in federal anti-discrimination statutes including the ADEA is not limited to entities in a direct employment relationship with employees, but also incorporates "agency principles." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754-55 (1998). Accordingly, many small public subdivisions with fewer than twenty employees themselves are actually ADEA-covered employers by virtue of their agency relationship with other "superior" public entities.

For example, in *Cink* v. *Grant Cty.*, the County Sheriff's Office fired a jailer/dispatcher after thirty

years of service. 635 Fed. App'x 470, 471 (10th Cir. 2015). Cink sued the County under the ADEA (and ADA), but lost on summary judgment. The district court concluded that the Sheriff's Office, not the County, employed Cink. The Tenth Circuit reversed, concluding that the Sheriff's office, like the County Board, was an agent of the County; it was not distinct from the County, though it was distinct from, and not controlled by, the County Board. *Id.* at 472-474.

While *Cink* assumed that § 630(b) did not cover public entities of all sizes, *id.* at 474 n.5, its case-by-case analytical approach would often result in a finding not to exempt from the ADEA "a political subdivision with many employees . . . on grounds that the immediate employing agent has fewer than fifteen employees." *Id.* at 473 (quoting *Owens* v. *Rush*, 636 F.2d 283, 286 (10th Cir. 1980)).

In weighing the alleged harm attributable to the reading of § 630(b) Petitioner challenges, it must be acknowledged that many "small" employers on whose behalf Petitioner pleads have nothing at stake in this case. They are qualified employers under the ADEA by virtue of agency principles and the Act's twenty-employee minimum, however the Court rules.

B. Other major federal civil rights laws establish liability for non-federal public entities of all sizes.

Petitioner does not explain why, if ADEA liability for small public employers is likely to be so dire, Congress has not uniformly exempted public

entities of all sizes from the reach of other major federal civil rights laws. For example, § 504 of the Rehabilitation Act of 1973—which was enacted one year prior to the statute here at issue, and which bars disability-based discrimination in employment and other operations by virtually all local and state public entities based on their receipt of "Federal financial assistance"—provides no such exemption. 29 U.S.C. § 794; *see Schrader* v. *Fred A. Ray, M.D., P.C.*, 296 F.3d 968, 969-75 (10th Cir. 2002) (concluding "[t]here is no suggestion that § 504 . . . as originally enacted, was limited to employers with fifteen or more employees"; and also ruling that § 504 does not incorporate the ADA's minimum employee coverage provision pursuant to an ADA amendment coordinating provisions of the two laws).

Nor does a small entity exemption exist in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, et seq., which prohibits discrimination on grounds of "race, color, or national origin . . . under any program or activity receiving Federal financial assistance," *id.*, § 2000d, or in the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101, et seq., which declares that "no persons in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." *Id.* at 6102. Title VI and the ADA of 1975, like § 504, apply to state and local government entities, without regard to size, 42 U.S.C. §§ 2000d-4a(1), 6107(4); 29 U.S.C. § 794(b) (all defining "program or activity" as, inter alia, "all of the operations of" every "department, agency, special

purpose district, or other instrumentality of a State or local government" receiving Federal financial assistance), albeit not in their capacity as employers. *See* 42 U.S.C. §§ 2000d-3, 6103(c).

In § 504, Congress acted, as in § 630(b), "to prohibit employment discrimination" by state and local subdivisions generally—i.e., "by *all* recipients of federal financial aid." *Conrail* v. *Darrone*, 465 U.S. 624, 634 (1984) (emphasis supplied). In *Darrone* this Court also ruled that § 504 authorized monetary relief in the form of backpay. 465 U.S. at 630 n.9. And the Court has since consistently found a "damages remedy available in private suits under Spending Clause legislation" that Congress modeled on Title VI, albeit within limits. *Barnes* v. *Gorman*, 536 U.S. 181, 185-90 (2002) (approving compensatory, but not punitive, damages under § 504) *Franklin* v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (approving damages remedy under Title IX of the Higher Education Act Amendments of 1972, 20 U. S. C. §§ 1681-88, in accordance with Title VI).

C. Most state age discrimination laws already permit monetary awards in litigation involving small state and local governments.

Not only do most states have laws against age discrimination affecting all employers (public and private) or at least all public employers, whatever the size of their workforce, *see* Resp. Br. at 26, but in more than half of all states, potential monetary relief for small public entities is markedly better under state

law than under the ADEA. Such remedies include compensatory and/or punitive damages, as under Title VII and the ADA, not just backpay, as under the ADEA.[13] Thus, however this case is decided, small public subdivisions face the prospect of monetary liability if they engage in age discrimination. Moreover, in most states, financial recovery for age discrimination against small *state employers* under state law is possible. *Kimel*, 528 U.S. at 91 and n.1 ("'[s]tate employees may recover money damages from their state employers, in almost every State of the union."). However, state employers of all sizes are immune from any monetary relief under the ADEA. *Id.* Hence, regardless of the outcome of this case, state law age bias litigation likely will be a far greater source of financial concern for most public employers than the ADEA.

Together, jurisdictions with age discrimination laws but no employee-minimum for public employers, *see* Resp. Br. at 28-29 n.6 (identifying thirty states and the District of Columbia), cover over three-quarters of

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[13] David Neumark, Ian Burns, Patrick Button & Nanneh Chehras, *Do State Laws Protecting Older Workers from Discrimination Reduce Age Discrimination in Hiring? Experimental (and Nonexperimental) Evidence*, Working Paper 2017-360 16-17 & n.26, 33-34 (Table 2) (Michigan Retirement Research Center, Mar. 2017), www.mrrc.isr.umich.edu/publications/papers/pdf/wp360.pdf (as of 2016, 29 states authorize compensatory or punitive damages under their age discrimination law, which "clearly entails stronger remedies that the [ADEA]").

all "special districts" nationwide.[14] This leaves just 9,358 special districts across 22 remaining states as potentially affected *only* by § 630(b). And in those 22 states with state law employee-minimums, at least another 1,256 districts employ over twenty employees and, hence, are already covered by the ADEA.[15] This is also true of the likely hundreds of districts covered by state laws exempting entities with smaller numbers of employees, *see, e.g.*, Connecticut (3 employee minimum), and New York and New Mexico (4 employee minimum), as well as others in states with slightly higher minimums, *see* Pet. Br. at 39. Petitioner's estimate of affected public agencies

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[14] This figure (28,967 districts in 31 states and DC, of a total of 38,266 special districts nationwide) is based on data relied on by Petitioner. *See* Pet. Br. 11 (citing U.S. Census Bureau, *Special District Governments by Function and State: 2012* (initial data release, Sept. 26, 2013), https//tinyurl.com/y8bdha3h). Petitioner specifically cites special districts in Illinois, as "over 60% of them hav[e] fewer than 20 employees." Pet Br. at 56. Yet, the relevant statute, Ill. Comp. Stat. 5/2-101(1)(c), has no numerosity requirement for public employers.

[15] This estimate is based on 2002 Census data, the most recent on special districts by state *and size of workforce*. *See* U.S. Census Bureau, *Special District Government Employment and Payrolls by Employment-Size Group and State*, Table 17, Governments-Public Employment, Special Districts, 138 (Mar. 2002), https://www.census.gov/prod/2005pubs/gc024x2.pdf. The estimate is conservative, as there were more special districts overall in 2012 than in 2002 and because the estimate includes only entities in the "50 or more full-time employees" and "24 to 49" categories. Plainly, many other entities in the "10 to 24" category are large enough to be covered even if the ADEA only applies to public employers with at least twenty employees.

plummets to perhaps 6,000 or even fewer. Surely, the reading of § 630(b) amici favor portends no disaster.

CONCLUSION

For all these reasons, amici urge the Court to affirm the decision of the Ninth Circuit in this case.

Respectfully Submitted,

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July 12, 2018

No. 17-587

In the Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,

Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioner and Respondent have filed a blanket consent with this Court to the filing of all *amicus* briefs.

the interests of state governments before Congress and federal agencies and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages,

representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an interna-

tional clearinghouse for legal information and cooperation on municipal legal matters.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources ("IPMA-HR") represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and current-

ly has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

This case directly impacts the interests of *amici* and their members. All state political subdivisions include special districts. If the Ninth Circuit's decision is left in place, small special districts in the Ninth Circuit and nationally will face daunting financial exposure, exposure that their small private employer counterparts do not face. *Amici* have a strong interest in ensuring that small special districts remain financially viable and able to provide the important services to the public they were designed to deliver. The Ninth Circuit's decision imperils that interest, and it should be reversed.

SUMMARY OF ARGUMENT

The undersigned *amici* urge this Court to reverse the decision below. First, special districts are a critical part of the web of state and local governments, providing services that are essential to public health and safe-

ty. Special districts are ubiquitous, numbering in the tens of thousands; small special districts like Petitioner may have only a few employees.

Created based on citizen demand, they provide services like fire protection (as in the case of Petitioner), water supply, hospital services, highway services, and other services without which day-to-day life would grind to a halt. Small special districts like Petitioner have lean budgets and lean staffs, ill-equipped to handle expensive employment discrimination lawsuits, just as their small private employer counterparts are similarly ill-equipped to do. Exposure to discrimination lawsuits would force a small special district to make severe budget cuts, making it impossible to deliver critical services on which residents depend.

Second, small public sector employers are particularly vulnerable, sometimes operating with only a handful of staff. In rural special districts, these concerns are heightened. There are fewer alternatives to layoffs and terminations when budget cuts must be made. Small, rural special districts may not

have other positions or locations to which they can transfer an employee in lieu of termination or layoffs. When resources are strained, already-leanly staffed special districts encountering employment discrimination lawsuits may find it impossible to remain financially viable.

Finally, "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Ninth Circuit's one-size-fits-all interpretation of Section 630(b) is inconsistent with principles of federalism. Small state and local government entities must have the latitude to staff their projects as they see fit, responsive to local needs and in line with particular project goals, without the financial burden of complying with a complex federal regime. The fact that these needs differ is illustrated by the different age discrimination statutes enacted by the States with a variety of minimum employee thresholds. If left in place, the decision below imposes burdens on small special districts like Petitioner disproportionate to their size, all in ignorance of the

local needs of the affected residents or the mission of the particular special district.

For these reasons, as well as the reasons discussed by Petitioner and fellow *amici*, the Court should reverse the decision of the court below.

ARGUMENT

I. Residents in Tens of Thousands of Municipalities Rely on Special District Governments To Provide Needed Services, Many of Which Are Essential to the Public's Health and Safety.

Special districts, like all state and local government, serve the public good. They provide many critical services to the community, exemplified by Petitioner Mount Lemmon Fire District, responsible for providing "Fire Protection, EMS, Rescue and Public Assistance to a 12.5 square mile area of the Santa Catalina Mountains in the Coronado National Forest." http://www.mtlemmonfire.org. Nationwide, thousands of municipalities rely on special districts for fire services. *See* U.S. Census Bureau, *Special District Governments by*

Function and State: 2012—United States—States, 2012 Census of Governments, https://tinyurl.com/y8bdha3h; U.S. Census Bureau, *Local Governments by Type and State: 2012—United States—States 2012 Census of Governments*, https://tinyurl.com/j2348jk; Evelina R. Moulder, *Police and Fire Personnel, Salaries, and Expenditures for 2013*, MUNICIPAL YEAR BOOK 2014 113-14 (ICMA Press 2014).

Although small special districts may only have a few employees, there are thousands of special districts in the Ninth Circuit and tens of thousands nationwide.[2] The U.S.

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[2] In Arizona, where this lawsuit was brought, there were 326 special districts in 2012. *See* U.S. Census Bureau, *Local Governments by Type and State: 2012—United States—States 2012 Census of Governments*, https://tinyurl.com/j2348jk. In California, there were 2,861 special districts; in Washington 1,285; in Oregon 1,035; in Idaho 806; in Montana 763; and in Nevada 139. *See id.* Thus, in 2012, there were a total of 7,215 special districts within the Ninth Circuit. Of Arizona's 326 special district governments, almost half (156) provided fire protection in 2012. *See* U.S. Census Bureau, *Special District Governments by Function and State:*

Census Bureau enumerated 38,266 special districts in 2012. *See* U.S. Census Bureau, *Population of Interest—Special Districts*, https://tinyurl.com/ya2v6uum.

Special district governments are "independent, special purpose governmental units that exist as separate entities with substantial administrative and fiscal independence from general purpose local governments." *Id.*[3] Special districts are governed by a board. Some boards are elected by the public, but most are appointed by the states, counties, or municipalities that have joined together to form the special district. *See* Nat'l League of Cities, *Local US Governments*, https://tinyurl.com/ycxecblt. Special districts raise money by levying ad valorem taxes, and some may, assuming they get voter approval, issue bonds. *See, e.g.*, U.S.

2012—United States—States, 2012 Census of Governments, https://tinyurl.com/y8bdha3h. Petitioner Mount Lemmon Fire District is one of those 156.

[3] According to the U.S. Census Bureau, the term excludes school district governments, which are defined as a separate governmental category. *Id.*

Census Bureau, *Individual State Descriptions: 2012, 2012 Census of Governments* 12, 25, 77, 176, https://tinyurl.com/ybk3q2wh.

Created to finance, construct, operate, and maintain capital infrastructure, facilities, and services, special districts perform one or a limited number of specialized services. That service could be anything from fire protection to mosquito abatement to cemetery upkeep. *See id.* Specifically, of the 38,266 special district governments enumerated by the U.S. Census Bureau in 2012, 5,865 provided fire protection; 3,522 provided water supply; 3,438 provided housing and community development; 3,248 provided drainage and flood control; 2,565 provided soil and water conservation; 1,909 provided sewerage; 1,705 provided library services; 1,692 provided cemetery services; 1,522 provided some other form of natural resources services; 1,433 provided parks and recreation; 1,099 provided highway services; 932 provided health services; 666 provided hospital services; 593 provided other utility district services; 492 provided air transportation services; 462 provided solid waste management; 223 provided industrial develop-

ment and mortgage credit; 178 provided education services; 171 provided some other form of transportation services; and 73 provided welfare services. *See* U.S. Census Bureau, *Special-District Governments by Function and State: 2012—United States—States*, 2012 Census of Governments, https://tinyurl.com/y8bdha3h. In addition, there were 1,243 other single-function districts and 5,235 multiple function districts. *See id.*

Special districts are created for a number of reasons, chief among them that "citizens demand services." Barbara Coyle McCabe, *Special District Formation Among the States*, 32 ST. & LOC. GOV'T REV. 121, 124 (2000). For example, "a growing area might desire additional services beyond those offered by a county, but not want the full range of services provided by municipal government." Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. LAW. 417, 446-47 (2016). Or a special district may be created because it "allow[s] the tailoring of service provision to geographic reality rather than preexisting political boundaries"—*e.g.*, draw-

ing boundaries that facilitate quick response times or that deal with the presence of lakes or rivers. *Id.*

A third reason is that special districts offer an avenue for local governments to issue more debt than state-imposed debt, tax, or spending limits permit; special districts are exempt from such limitations. *Id.*; *see also* U.S. Census Bureau, *Gov't Finances: Finances of Special Districts* VI (1992), *available at* https://tinyurl.com/yd3494w2 ("As new programs are initiated, or new services required, the establishment of special districts may reduce the need to increase the burden on general purpose governments which may be unable to meet the fiscal requirements necessary to implement these new programs. Debt and tax limitations are further stimulants for creating special districts for raising both capital construction and operation expenditure funds."). Indeed, "[i]ndebtedness is important for special district governments because many of them have as one of their primary purposes the financing of governmental activity through the issuance of debt." *Id.* at VIII.

Special districts can also reduce the budgetary pressure on local governments by providing services free from state-imposed administrative mandates on local governments. Kazis, 48 URB. LAW. at 447. And "[l]ocal communities have long used special districts as a means to overcome collective action problems in the provision of services with public good qualities." Barton H. Thompson, Jr., *Markets for Nature*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 261, 306 (2000) (using as examples farmers forming "irrigation districts to import and distribute water supplies[,] . . . pest control districts to exterminate crop-threatening insects[,] [and] [r]esidents of flood-prone areas . . . form[ing] flood control districts to finance dams and other engineering control measures.").

As noted by Petitioner in its *certiorari* briefing, Mount Lemmon Fire District, like other small special fire districts, has a modest budget. *See* ARIZ. REV. STAT. ANN. § 48-807; Arizona Fire Dist. Ass'n, *Fiscal Year 2017/2018 Fire District Required Budget Postings*, http://tinyurl.com/y7sybnva; *see also* Cert. Pet. 8; Mount Lemmon's Rule 56.1 Statement of Facts, *Guido v. Mount Lemmon*

Fire Dist., No. 13-cv-00216-TUC-JAS (D. Ariz. Aug. 8, 2014), ECF No. 69 ("SOF"), at Ex. 3 (noting that $67,000 was 13% of Mount Lemmon's 2009 operating budget).

Mount Lemmon Fire District is also leanly staffed, numbering just eleven full-time employees in 2009. *See* SOF ¶ 16. Budget cuts have a particularly dramatic impact on small special districts. *See, e.g.*, *County's Tiny Districts Hit Hard by State Budget Cuts*, LA TIMES (Sept. 7, 1992), https://tinyurl.com/ydxlmblb ("Now comes the agonizing decision. If this means layoffs, who among the grand total of five firefighters in the department must go? . . . [The fire chief] said . . . 'It could cause me to lose two people.'").

Although some special districts have been criticized for lack of transparency with respect to spending the monies they have raised, there are no such concerns regarding Mount Lemmon Fire District. As noted by Petitioner in its *certiorari* briefing, the budget shortfall created by a drop in property tax revenue led to multiple efforts to raise

money—even resorting to bake sales. Cert. Pet. 8 (citing SOF ¶¶ 1-11).

State and local governments as well as non-governmental organizations are addressing these criticisms in a number of ways, including legislation and incentive programs. *See, e.g., Greater Chicago Mass Transit Transparency and Accountability Portal*, https://tinyurl.com/ydhwb5yk (established through legislation); Dep't for Local Gov't, *Special Purpose Government Entities Financial Disclosure Reporting Portal*, https://tinyurl.com/y9j533o4 (established through legislation); Texas Comptroller of Public Accounts, *Transparency Stars*, https://tinyurl.com/y9j9dbpd (incentive); Government Finance Officers Ass'n, *Popular Annual Financial Reporting Award Program*, https://tinyurl.com/yckzmvq2 (incentive); Special District Leadership Foundation, *District Transparency Certificate of Excellence*, http://www.sdlf.org/transparency (incentive).

As the foregoing demonstrates, special districts are a key conduit of services to the public. Many of these services are essential

to the state and local government mission of maintaining public health and safety. Imposing litigation expenses on small special districts that would necessitate severe budget cuts threatens the ability of small special districts to deliver those services. Reversal of the decision below is warranted.

II. Congress Had Good Reasons To Exempt Small Government Entities.

Congress has passed other federal employment statutes that treat small public sector and small private sector employers with parity. For example, Congress amended section 701 of Title VII to cover States and local government subdivisions but did so with an eye to parity, requiring the same 15-employee minimum for both public and private employers. *See* Pub. L. No. 92-261 § 701(b), 86 Stat. 103 (1972); *see also Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). The Americans with Disabilities Act also applies to both private and public sector employers with the same minimum number of employees. *See* 42 U.S.C. §§ 12111(5)(A), 12131(1)(B).

The legislative history of section 630(b)(2) does not explicitly address the minimum employee requirement. *See Morelli v. Cedel*, 141 F.3d 39, 45 (2d Cir. 1998). However, it memorializes Congress's decision to include agencies and instrumentalities within the ADEA definition of "employer," reflecting Congress's intention to "treat both public and private employers alike, with 'one set of rules.'" *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *see also Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 271-72 (7th Cir. 1986) (discussing legislative history of ADEA) ("the legislative histories of both the ADEA and Title VII amendments indicate that Congress's main purpose in amending the statutes was to put public and private employers on the same footing.") (citing Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law*, at 17 (1973) (supporting extension of the ADEA because "it is difficult to see why one set of rules should apply to private industry and varying standards to government"); H.R. REP. NO. 257, 93d Cong., 2d Sess. (1974) (recommending addition of public employers to the ADEA as well as lowering the minimum number of em-

ployees without drawing distinction between coverage of public and private employers); 120 CONG. REC. 8768 (1974) ("the passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector.") (statement of Sen. Bentsen)).

In addition, "[t]he ADEA was modeled in large part on Title VII." *Morelli*, 141 F.3d at 45. Courts have identified reasons for Title VII's minimum-employee requirement, including "the burdens of compliance and potential litigation costs, the protection of intimate and personal relations existing in small businesses, potential effects on competition and the economy, and the constitutionality of Title VII under the Commerce Clause." *Id.* (internal quotation marks and citations omitted); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (citing relevant legislative history of Title VII) ("Congress decided to protect small employers in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims.")

(internal quotation marks and citation omitted), *abrogated on other grounds by Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1205 (2006) (describing Congress's debates leading to enactment of Title VII and its 1972 amendment as including discussion of "reliev[ing] small firms of the otherwise disproportionate costs they might bear under the new law" and "avoid[ing] over-extension of the [EEOC]'s limited resources.").

Small government entities, and in particular rural special districts, are particularly vulnerable to policies that endanger their financial viability.[4] Rural areas make up 72% of this country's land area and house 46 million residents. United States Dep't of Agriculture, Economic Research Service, *Rural*

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[4] It is not just local governments and special districts that have small numbers of employees; some state agencies do as well. *See, e.g., Palmer*, 154 F.3d at 894 (five employees).

America at a Glance (2017 ed.), ECONOMIC INFO. BULLETIN NO. E1B-182, at 1 (Nov. 2017), https://tinyurl.com/yblcgsbw ("*Rural America at a Glance*"). Rural areas have fewer resources, fewer opportunities, and a shrinking population.

According to the United States Department of Agriculture, "[r]ural areas tend to have significantly fewer financial, professional, scientific and information services activities that concentrate in urban economies." U.S. Dep't of Agriculture, *Economic Research Service, Business & Industry Overview,* https://tinyurl.com/ycp4nhzw. Moreover, "the rural population is shrinking for the first time on record, due to several factors, including long-term outmigration of young adults, fewer births, increased mortality among working-age adults, and an aging population." *Rural America at a Glance* 1; *see also* Angelo Verzoni, *Shrinking Resources, Growing Concern,* NFPA JOURNAL (2017), https://tinyurl.com/yclryvgn ("*Shrinking Resources*") ("[R]ural America is becoming more rural. The continued decline suggests that many problems facing the rural fire service will only become more prominent

as resources of all kinds—human, technological, monetary, and more—become increasingly scarce."). A rural-urban income gap has persisted since 2007, "stem[ming] partly from lower levels of labor force participation in rural areas due to an older population, higher disability rates, and other factors." *Rural America at a Glance* 4; *see also* Gracy Olmstead, *Stuck in America's Struggling Small Towns*, THE AMERICAN CONSERVATIVE (Feb. 5, 2018), https://tinyurl.com/ycb48sgk (Much of rural America . . . is growing 'older, poorer, and less educated.'") (citation omitted); Alana Semuels, *The Graying of Rural America*, THE ATLANTIC (June 2, 2016), *available at* https://tinyurl.com/jy326a6 ("Population decline in rural America is especially concentrated in the West.").

The vulnerability of special districts located in these areas is evidenced in a number of ways. To begin with, "[r]ural America has long been known to be at higher risk for fire and life safety threats, [because] [w]ith sparsely populated, large expanses of land, it can be hard for the fire service in rural communities to reach people—both physically and in terms of education and enforce-

ment." *See Shrinking Resources*, https://tinyurl.com/yclryvgn. NFPA data presents a stark picture: "The rate of fires per thousand population in communities of 1 million or more is 3.1 . . . [t]he national average is 4.5. For communities of 2,500 to 4,999, it's 6.8, and for communities under 2,500, it's 10.8—more than double the national average." *Id.* The statistics are equally bleak for fire deaths: "[T]he rate of civilian fire deaths per million people in communities of 1 million or more is six, almost half the national average of 10.9. For communities of 2,500 to 4,999, it's 19.3, and for communities of under 2,500, it's 20.9." *Id.*

Layoffs and terminations may be more common in small, rural special districts due to the need to cut costs. There are fewer alternatives, and their resources are already strained. *See, e.g.*, Cert. Pet. 8 (describing how drop in property tax revenue created a budget shortfall for Mount Lemmon Fire District, giving rise to the need to lay off Respondents for six months when other efforts, including bake sales and supplemental work on behalf of federal authorities, failed to raise enough money); *see also* Ryan Sum-

merlin, *Carbondale Fire District Seeks Status Quo Funding Via Voter Approval*, ASPEN TIMES (Oct. 28, 2017), *available at* https://tinyurl.com/y7tzwz7k (noting that if the fire district's revenue is reduced, the fire district would have to reduce its staff: "that reduction would have to come from somewhere, and it would ultimately come out of people.").

Concurrent with such lay-offs and terminations is a rise in expensive employment discrimination claims. These costs are even more challenging for small special districts that operate on fixed budgets. *See, e.g., Shrinking Resources*, https://tinyurl.com/yclryvgn ("Every fire department faces challenges, but they're often more pronounced for small departments. NFPA's fourth and most recent Needs Assessment Survey of the U.S. Fire Service . . . exposed striking deficiencies in everything from apparatus to personal protective equipment (PPE) to training in departments protecting populations of 5,000 people or fewer."). And many of those rural budgets are shrinking. *See, e.g., Rural Colorado Fire Departments Could Get Badly Hurt by*

Budget Cuts, CBS4 Denver (Mar. 30, 2017), *available at* https://tinyurl.com/y99qlq5d (describing district as the first responder for 280 square miles as having only 16 full-time employees and warning that "deep budget cuts" could "put public safety at risk" because "some rural departments . . . wouldn't be able to absorb those losses . . . they would have to close their doors."); *Grand Traverse Rural Fire Chief Resigns Amid Budget Frustrations*, 9&10 News (Dec. 22, 2016), *available at* https://tinyurl.com/ybs5vzbr.

Moreover, lawsuits may be more common in small, rural special districts because they may not have the luxury of transferring employees to another position or location. There are fewer positions and locations to choose from. *See, e.g., Palmer*, 154 F.3d at 897 ("Congress based its twenty-employee minimum on 'the practical consideration that a larger employer with more varied jobs could more constructively utilize an older worker's skills.'") (quoting *Kelly*, 801 F.2d at 272 n.3). In *Kelly*, the Park District had just one full-time, year-round employee, and in a four-year span, it never had more than three of its thirteen employees work five days in

each of twenty or more weeks in any of those years. 801 F.2d at 270. The Arkansas Council on Economic Education in *Palmer* had only five employees. 154 F.3d at 894. And as noted, Petitioner Mount Lemmon Fire District has only eleven employees. *See supra* p. 15.

Nor can special districts simply pass along the liability costs to larger State entities as Respondents have argued. *See* Cert. Opp. 14; *but see* Cert. Reply 12. In reality, most special districts, including Mount Lemmon Fire District, are established by citizen vote, have independent budgets, and are governed by a dedicated board. Cert. Pet. 6-7; Cert. Reply 12; *see, e.g.*, ARIZ. REV. STAT. ANN. § 48-803; *see also, e.g.*, U.S. Census Bureau, *Individual State Descriptions: 2012, 2012 Census of Governments* 12, https://tinyurl.com/ybk3q2wh ("Districts to provide fire protection in unincorporated areas are formed by petition to the county board of supervisors followed by a public hearing. Districts are governed by an elected board of three to seven members . . . .") (Arizona fire districts); *id.* at 25 ("established by the county board of supervisors upon peti-

tion of voters if approved by the local agency formation commission and the voters at referendum") (California fire districts); *id.* at 77 ("fire protection districts are established by the county commissioners on petition of landowners and after a public hearing and referendum") (Idaho fire districts); *id.* at 176 ("[a]reas to provide fire protection are created by resolution to the county commissioners upon petition of property owners and after public hearing. A board of trustees, either elected by the property owners or appointed by the county commissioners, governs each fire service area.") (Montana fire districts).

As Petitioner noted in its Reply at the *certiorari* stage, the additional costs imposed on small special districts by ADEA liability will not be offset by insurance pools. Cert. Reply 11. Indeed, those costs will simply be repackaged as a spike in insurance premiums, imposing a heavy financial burden on the special districts. Such a burden is the precursor to budget cuts and, inevitably, a discontinuation of often vital public services. *Id.*; *see also* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1144

(June 2016) ("[S]maller agencies that pay nothing from their budgets towards lawsuits may nevertheless have their very existence threatened if liability insurers raise premiums or terminate coverage in response to large payouts."); *id.* at 1149 ("[S]maller jurisdictions that rely primarily on outside insurance report that a spike in suits may cause an insurer to demand changes . . . as a condition of continued coverage; agencies that do not comply have lost their insurance coverage and ceased to exist. . . . [P]ressures and obligations imposed by outside insurers are an important and underappreciated consequence of liability for smaller law enforcement agencies."); *id.* at 1190-91 (discussing "several reports of police department closings caused by insurers' premium increases or decisions to end coverage."). And when special districts providing fire services close, tragedy strikes. *See, e.g.,* Rachel Dornhelm, *Fire Stations Cut Services as City Budgets Shrink* (Sept. 29, 2017), *available at* https://tinyurl.com/y845bwmh (describing how during a "big house fire . . . the engine closest to the burning home was closed, and by the time another company arrived from farther away, a second house had

caught fire" and how on another occasion, "relatives brought a choking 2-year-old to the fire station down their block, [which] was closed that day for budget reasons [and because] it took 9 ½ minutes for a paramedic to arrive, [t]he boy did not survive.").

Congress knew that, in light of all small special districts (and other small state and local governments) do for their communities, there is no principled reason for treating small public sector employers more harshly than small private sector employers. Congress's exemption of small special district governments made good sense. The decision below does not.

III. The Decision Below Violates the Principles of Federalism by Making the Smallest State and Local Government Entities Subject to a Federal Law that Imposes a Burden Disproportionate to their Size.

The one-size-fits-all approach taken by the decision below glosses over the very real challenges faced by small public sector employers. Moreover, it tramples on the principles of federalism. "Federalism is more

than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself; rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 564 U.S. 211, 221 (2011) (citation and internal quotation marks omitted). Indeed, "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J. and O'Connor, J., concurring).

The Constitution's framework of dual sovereignty gave rise to the "plain statement rule" of statutory construction in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), discussed in Petitioner's brief. *See* Pet. Br. 15, 37; *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) ("if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.") (citation omitted). Principles of federalism have led this Court to consistently refer to the plain statement rule to justify interpret-

ing federal laws not to "interpos[e] federal authority between a State and its municipal subdivisions." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004); *see also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). Although the subdivisions themselves are not sovereign actors, *see, e.g., Alden v. Me.*, 527 U.S. 706, 756 (1999), Congress must still lightly intrude on powers delegated to them by the States.

As this Court has held, "[t]he principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Mortier*, 501 U.S. at 607-08 (internal quotation marks and alterations omitted); *see also Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978).

Most States, including Arizona, have enacted statutes to prohibit age-based employment decisions by some of the small public sector employers who have less than 20 employees. *See* Nat'l Conf. of State Legisla-

tures, *State Employment-Related Discrimination Statutes* (July 2015), https://tinyurl.com/ybzxb59d. However, the minimum number of employees varies by State, evidence that each State has exercised its autonomy to set liability thresholds according to the needs of its particular political subdivisions. *See id.* (*comparing* ALA. CODE § 25-1-20, et seq. (setting threshold at 20 employees or more) *with, e.g.,* ALASKA STAT. ANN. § 18.80, et seq. (setting threshold at 1 or more employees); WEST'S ANN. CAL. GOV. CODE § 12900, et seq. (setting threshold at 5 or more employees); WASH. REV. CODE ANN. § 49.60.010, et seq. (setting threshold at 8 or more employees)). Indeed, each State is in the best position to balance the important but competing issues of anti-discrimination legislation and a small employer's ability to withstand potentially crippling litigation. The Ninth Circuit's decision blows through the carefully calibrated local thresholds in these States like a windstorm. But one size does not fit all—what makes sense for Maine and Vermont, the states with the highest rural populations, and what makes sense for California and New Jersey, the states with the most urban populations, will vary great-

ly. *See Growth in Urban Population Outpaces Rest of Nation*, Census Bureau Reports, *available at* https://tinyurl.com/godok3n. Ultimately, the citizens expecting to receive services from the affected special districts will end up paying the price.

In enacting section 630(b), Congress was legislating against the backdrop of the principles of federalism and well established interests and expectations of the States. Interpreting section 630(b) as applying to all public sector employers, even to special districts of very small size, completely loses sight of the careful balance struck by this Court, in countless situations, between federal and state sovereigns. As noted, if the decision below is affirmed, "States may be pressured into attempting compliance on the cheap," cutting either the amount or the quality of the services entrusted to their care. *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 610 (1999).

And "[t]his danger is in addition to the federalism costs inherent in referring state decisions regarding the administration of . . .

programs and the allocation of resources to the reviewing authority of the federal courts." *Id.* This is, of course, not to say that the ADEA should not apply to public sector employers at all; it obviously does. But the decision below tramples on these concerns in extending application of the statute to small public sector employers like Mount Lemmon Fire District, a special district working to meet the life-and-death needs entrusted to it with eleven employees. The burden placed upon such small special districts is disproportionate to their size, and this Court should rectify the Ninth Circuit's error.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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